



ALSTON + BIRD LLP
Legislative & Public Policy

2012 POST-ELECTION ADVISORY

PICTURED ABOVE L TO R: Earl Pomeroy, Counsel at Alston & Bird and a former Member of the House Ways & Means and Agriculture Committees; Bob Dole, Special Counsel at Alston & Bird and former Senate Majority Leader, Billy Tauzin, Special Legislative Counsel at Alston & Bird and former Chairman of the House Energy & Commerce Committee; and Blanche Lincoln, Special Policy Advisor at Alston & Bird and former Chairman of the Senate Agriculture Committee and Member of the Senate Finance and Energy Committee.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

TABLE OF CONTENTS

I. Fiscal Cliff, Budget, Appropriations & Transportation Finance	5
a. Background on the Fiscal Cliff	5
b. Lame Duck Fiscal Cliff Scenarios	6
c. Key Dates in the Budgetary Process	7
d. Hurricane Sandy Relief Efforts	8
e. Transportation Finance	8
f. FY13 Appropriations.....	9
II. Energy	10
a. Energy Efficiency and Conservation.....	10
b. Oil and Gas.....	11
c. Energy Tax Provisions and Incentives.....	12
d. Climate Change.....	12
e. Renewable Energy Standard.....	13
f. Carbon Capture and Storage.....	13
III. Tax Policy	14
a. “Taxmageddon” – The Expiring Tax Code.....	14
b. Tax Reform and Deficit Reduction	14
c. Tax Priorities for President Obama	15

IV. Privacy and Data Security	16
a. Privacy Legislation	17
b. Electronic Communications Privacy Act (ECPA) Reform	17
c. Data Security Legislation	17
V. Cybersecurity	19
VI. Health Care	21
a. Lame Duck	21
b. Affordable Care Act	21
c. Medicare.....	22
d. Medicaid.....	23
e. Health Information Technology (Health IT).....	23
VII. Banking and Financial Services	24
a. Derivatives/Swaps Market Regulation	25
b. Basel III: Increased Capital Standards.....	25
c. Volcker Rule: Limits on Proprietary Trading by Financial Institutions	26
d. Consumer Financial Protection Bureau Acts Aggressively to Fulfill its Statutory Mission	26
VIII. Foreign Policy	27
a. Afghanistan and the War on Terror	27
b. Promote Stability in the Middle East.....	27
c. Major Power Relations.....	28
d. Congressional Support for Democracy Abroad	29

IX. International Trade	30
a. Negotiations in Progress.....	30
b. United States-European Union Free Trade.....	30
c. The BRICs and Emerging Markets	30
d. Brazil	31
e. Russia	31
f. India.....	31
g. China.....	31
h. The Middle East.....	32
X. Aviation (DOT/FAA)	33
XI. Homeland Security and Defense	34
XII. Agriculture	36
XIII. Election Law	38

I. FISCAL CLIFF, BUDGET, APPROPRIATIONS & TRANSPORTATION FINANCE

a. Background on the Fiscal Cliff

On January 2, 2013, \$1.2 trillion in automatic, across-the-board spending cuts to defense and domestic programs—known as “sequestration”—are set to begin as mandated by the Budget Control Act of 2011. Additionally, among the laws set to expire at midnight on December 31, 2012, are the Bush tax cuts (resulting in an increase in individual income tax rates), last year’s temporary payroll tax cuts and unemployment benefits. The simultaneous onset of tax increases and drastic spending cuts set to occur unless Congress acts during the lame duck session have been referred to by Federal Reserve Chairman Ben Bernanke as the “fiscal cliff.”

President Obama has said that sequestration should not happen and has proposed in his budget to avoid it, with a mix of spending cuts and tax increases. In the House, Republicans passed a bill that would replace sequestration with a smaller \$237.8 billion cut aimed at preventing the projected reductions in defense funding in the first year (H.R. 5652). The bill would make various cuts in domestic programs, including SNAP (the program previously known as food stamps), flood insurance and social service block grants. It would also make changes in medical liability rules. The Senate has yet to take action on specific legislation to avoid sequestration, though Senate leaders have also said that sequestration should not occur as planned.

The inability of Congress to enact a plan to reduce the deficit by \$1.2 trillion, as required by the Budget Control Act, triggered a requirement that the President submit to Congress a report outlining the potential impact of sequestration. In this report, released on September 14, 2012, the White House presented Congress with a breakdown of budget accounts that would and would not be affected by sequestration, an estimate of the funding reductions that would be required across impacted accounts and additional information on the potential implementation of sequestration.

In addition to having to address the fiscal cliff, Congress will have until the first couple months of 2013 to craft a deal to increase the debt limit before the government exhausts its ability to borrow (the government is expected to reach the debt limit in late February or March). The last time the federal government approached the debt limit, the two parties were unable to come to an agreement until mere hours before the government would have defaulted. This inability to compromise, and the threat of future default, led to the first-ever downgrade of the nation’s credit rating. As the nation again approaches its credit limit, the credit rating agencies will be taking a close look to see if the two parties have learned their lesson and can come to an agreement well before the date of default. If not, then there is a real threat that the credit rating agencies will once again downgrade the nation’s credit rating.

The need to raise the debt limit is likely to once again become a political bargaining chip. With President Obama having won re-election, Republicans may look to delay full resolution of the fiscal cliff issues, so that they can use their acquiescence to raising the debt limit as a bargaining chip in exchange for fewer defense cuts and tax increases.

b. Lame Duck Fiscal Cliff Scenarios

“Framework” or “Partial Fix”

Both parties have an interest in avoiding the potentially devastating effects on the economy that many analysts are predicting unless the fiscal cliff is addressed. In the lame duck session, President Obama will have an opportunity to fulfill certain of his policy objectives, including preventing tax increases for most Americans, allowing tax increases to go into effect for wealthier Americans and reducing tax benefits for large corporations. On the Republican side, avoiding the defense cuts that go into effect under sequestration is a major priority.

Possible outlines of a compromise in a lame duck session would include some tax increases, some spending cuts and a down payment on the deficit that will temporarily forestall sequestration. This approach would push off the need for immediate action in January, allowing further time for Congress to reach a more comprehensive proposal next year. This approach could also include a framework for future action, such as new spending or tax changes that would go into effect if Congress does not act by a set date (e.g., a variation of the current sequestration process).

Another potential compromise that congressional leaders are presently discussing is a plan to make a down payment of targeted spending cuts, worth about half of the \$110 billion in sequestration cuts set to hit in January, while establishing a framework for additional cuts. This proposal was originally suggested by the bipartisan group of senators formerly known as the Gang of Six (now the Gang of Eight) and is now being considered and discussed by Democratic leadership.

Another possible scenario for a compromise that has been discussed would be for Congress to allow the Bush tax cuts to expire on December 31 pursuant to an agreement that the 113th Congress will act quickly in January to address the fiscal cliff by, among other things, lowering individual tax rates. Such a “re-set” could be attractive to President Obama, because it may make it politically easier to retain higher rates for wealthier Americans. Some Republican analysts have also suggested that this approach could be attractive to Republican members by allowing them to avoid violating their pledge not to increase taxes by committing to lower taxes in January at a net increase over current levels (but still lowering individual tax rates from Clinton-era levels).

The Gang of Eight continues to be hard at work constructing a plan to avoid sequestration and, while they have not yet been able to put forth a proposal, the election results and the short timeframe left for action will make this group a focal point for a potential compromise during the lame duck session. The Gang of Eight includes Mark Warner (D-VA), Majority Whip Dick Durbin (D-IL), retiring Budget Chairman Kent Conrad (D-ND), Michael Bennet (D-CO), Tom Coburn (R-OK), Saxby Chambliss (R-GA), Mike Crapo (R-ID) and Mike Johanns (R-NE).

Now that he has been re-elected, President Obama has an interest in seeking to achieve a compromise on spending cuts and revenue increases before Republicans can use the need to raise the debt limit as a bargaining chip in the fiscal cliff negotiations.

No Deal

Despite the interest in avoiding the fiscal cliff, it is possible that the difficulties in reaching a compromise will carry over into the lame duck, with the result that no deal is reached. In that event, the 113th Congress will be presented with a new base line—all the Bush tax cuts and other expiring tax provisions (as well as certain spending provisions) will have expired. Sequestration will be set to go into effect. These consequences may

serve the interests of the Obama Administration, because it provides a clean slate from which to legislate on taxes and spending; e.g., would allow the President to reduce tax rates on the middle class, while keeping higher rates for others. The risk for the President and Congress of such an approach is that predicted severe negative effects on the economy may become realities.

Failure to act in a lame duck session on key items creates the potential for fairly swift action in the beginning of the 113th Congress on these same issues. Discussions occurring during the lame duck session may provide ground work for early legislation in the 113th Congress.

Grand Bargain

Under a grand bargain, the lame duck session would deal with fiscal issues, including taxes and spending, on a longer-term basis. Now that President Obama has been re-elected, he could try to use the threat of immense cuts to defense spending under sequestration in an attempt to force Republicans to work towards a grand bargain that would involve trillions of dollars in new revenue increases and spending cuts.

There has been some evidence that Republicans may be willing to compromise with the President on a long-term deficit reduction package. Recently, when asked what would happen if Obama won the election, conservative Senator Jim DeMint (R-SC) was quoted as saying “we might as well cut a deal” because “if Republicans want to maintain the defense, we’re going to have to give tax increases to Obama.” Additionally, less conservative Republican senators, including John McCain (R-AZ), Lindsey Graham (R-SC) and Lamar Alexander (R-TN) have openly expressed a willingness to consider new revenue as part of a deal to block defense cuts and secure entitlements. Despite statements of this nature, a grand bargain is the least likely outcome of a lame duck. Democrats are also wary of a grand bargain in a lame duck, concerned that spending cuts may go too far. Also, as a practical matter, the short time frame of a lame duck session make it difficult to resolve the political issues and technical details involved in a grand bargain.

c. Key Dates in the Budgetary Process

- **November 6:** Election Day
- **November 7 – December 31:** Lame Duck Session Range. Chairmanship and Ranking Member elections, as well as planning meetings, will take place at this time.
- **November 22:** Thanksgiving Day
- **Late November – Early December:** Retiring or defeated Members have to vacate offices.
- **December 31:** Expiration of:
 - Bush tax cuts, including individual income tax rate structure and estate tax provisions
 - Unemployment benefits extension
 - Payroll tax holiday
 - Medicare payment schedule (“Doc Fix”)
 - Tax extenders: Other tax provisions expire or have previously expired, including the AMT exemption amounts, the R&D credit, and many popular business and individual tax provisions

- **January 2:** Sequestration order due to begin \$1.2 trillion in budget cuts.
- **January 3:** The 113th Congress is sworn into office at noon; bills from the prior Congress that have not passed will need to be re-filed.
- **January 20:** Inauguration Day – the new president will be sworn into office privately at noon; the actual ceremony will take place on January 21.
- **February – March:** The government is expected to reach the \$16.4 trillion debt limit close to the end of this year, but the Treasury Department can take some emergency cash management measures to avoid default for a couple of months into 2013.
- **March 27:** Expiration of FY13 continuing resolution (CR).

d. Hurricane Sandy Relief Efforts

Congress will be considering additional spending during the lame duck session to pay for the efforts to rebuild housing, infrastructure and roads in communities impacted by Hurricane Sandy. While the Federal Emergency Management Agency (FEMA) is at present relatively well-funded, the scope of the disaster may necessitate additional funding for the Agriculture, Transportation and Housing and Urban Development departments or the Army Corps of Engineers, all of which are involved in the recovery efforts. The current continuing resolution (CR) that funds the government through March 27, 2013, does not provide extra money for the disaster relief efforts of these entities. Additionally, some Members are concerned that, due to the unprecedented magnitude of the storm, FEMA may run out of disaster relief funding as well.

Proposals to provide supplemental federal funding for the recovery efforts have received bipartisan support. On Monday, November 5, 2012, 44 House members, led by Congressmen Joseph Crowley (D-NY) and Frank LoBiondo (R-NJ), wrote a letter urging Speaker John Boehner (R-OH) and Minority Leader Nancy Pelosi (D-CA) to pass a supplemental appropriations bill during the lame duck session to support hurricane relief. According to the Secretary of Housing and Urban Development Shaun Donovan, funding beyond the existing FEMA money appropriated for disaster relief will require legislation. Thus, there will be a push, particularly from Members affected by the hurricane, for a disaster relief package to be squeezed into what already promises to be a busy lame duck session.

e. Transportation Finance

This has already been a big year for transportation policy, with Congress having passed a two-year transportation reauthorization bill, the Moving Ahead for Progress in the 21st Century Act (MAP-21; P.L. 112-141), which went into effect on October 1. Now, the negotiations over how to avoid the impending sequestration and expiration of tax cuts provide a unique opportunity to potentially resolve longstanding transportation issues.

The budget deal that lawmakers will be negotiating to avoid the fiscal cliff will involve trillions of dollars in new revenue increases and spending cuts. Though a long-shot, the negotiations over this grand bargain may make it easier for lawmakers to set aside billions of dollars in revenue through an increase in the gasoline tax to make the Highway Trust Fund solvent or provide a new alternative funding source. Linking the increased gas tax to a deficit reduction package is an idea endorsed by the presidentially appointed deficit reduction commission

led by former Senator Alan Simpson (R-WY) and former Clinton White House Chief of Staff Erskine Bowles, which suggested phasing in a 15-cent-per-gallon increase over three years. While neither Congress nor the Obama Administration embraced the Simpson-Bowles recommendation, the commission's overall proposal has served as a framework in the Gang of Eight's efforts to propose a deficit reduction compromise and will likely serve as a starting point for debate during the lame duck session.

If the efforts to strike a deal during the lame duck session fail, then the 113th Congress may include a long-term funding source for the Highway Trust Fund either in a deficit reduction bill that includes comprehensive tax reform and spending cuts or in the next transportation reauthorization bill.

f. FY13 Appropriations

None of the 12 annual appropriations bills were sent to President Obama's desk prior to the November elections. Although the Budget Control Act included spending targets for FY12 and FY13, only the Senate wrote spending bills following those figures. The House versions of the FY13 bills carried \$20 billion less than was provided for in the Budget Control Act to reflect the more conservative spending target developed by House Budget Committee Chairman and Mitt Romney's running mate Paul Ryan (R-WI).

To avoid a government shutdown, on September 28, President Obama signed a CR that keeps the federal government running through March 27 at the \$1.047 trillion FY13 cap set for discretionary spending by the Budget Control Act. The CR includes a modest \$8 billion increase (or less than one percent) over FY12 spending, a roughly 0.6 percent across-the-board increase for nearly all federal agencies.

Enactment of the CR sets Congress up for another shutdown fight early next year and seems to strengthen the Republican position in future efforts to cut federal government spending, along with the beginning of congressional review of the FY14 budget, which the President will submit in February.

II. ENERGY

As policymakers recognize, an affordable, reliable energy supply is fundamental to growing our nation's economy. Despite this realization, Congress and the executive branch have had division over reaching consensus on an approach to establish new national energy policy. However, with newly identified domestic sources of oil and natural gas, as well as the development of technologies, including hydraulic fracturing, designed to extract these resources and the need to ensure tax policy enables expansion of the energy sector as a critical element of the country's economic recovery, the administration and Congress will identify areas where law can be adopted. "While energy policy was one of the top-tier issues of the 2008 presidential campaign, it remained just below the level of a central theme in the 2012 race. Both candidates acknowledged the role energy will continue to play in our nation's economic recovery. Now, with the presidential race and congressional cycle in the rearview mirror, the first year of the new Congress will present opportunities for the development of bipartisan solutions that address key energy challenges facing our country," said Bob Dole, former Senate Majority Leader and Special Counsel at Alston & Bird.

A number of key energy issues will continue to be affected by the political composition and division in both the House and the Senate. For example, renewable energy proposals, which have also suffered due to certain scandals related to stimulus programs, will be affected further by the loss of key advocates, such as retiring Senator Jeff Bingaman (D-NM), who has served as the Chairman of the Senate Energy Committee. Senator Ron Wyden (D-OR) is anticipated to be his successor. Senator Lisa Murkowski (R-AK) is expected to continue to serve as the lead Republican on the Committee. On the other side of the Capitol, the House Energy & Commerce Committee will continue to be chaired by Representative Fred Upton (R-MI), who manages the Committee's business and legislative approach on conservative principles, while Representative Henry Waxman (D-CA) will serve as the Ranking Democrat.

"America is on a track to real energy security, if not independence. New finds and new production technologies point to significant opportunities to access proven domestic reserves of oil and gas, with energy prices increasingly determining the level of development. Should there be a policy shift toward accelerated access to public lands anywhere near the rate of activity on private lands, we could be in for boom times in this energy space. While there are debates over government support for renewables, the more telling policy debates will involve the EPA regulations on coal production and coal-fired plants, the energy tax policy on domestic versus foreign production, and the aging and weaknesses of the nation's electric grid. Attention will also have to be paid to the reliability of refining capacity and deliverability issues in order to avoid price spikes in a recovering economy. Every player in the energy arena had best be keenly involved in the coming tax and energy policy debates here in Washington to ensure their perspectives are well heard and considered by the policymakers setting the agenda," said Billy Tauzin, Alston & Bird special legislative counsel and former Chairman of the House Energy & Commerce Committee.

a. Energy Efficiency and Conservation

The Enabling Energy Savings Innovations Act, when passed by the House in June, was designed to revise the Department of Energy's (DOE) regulations regarding energy efficiency of walk-in coolers and freezers. In September, the Senate took up and passed the bill with an amendment by Energy and Natural Resources Chairman Bingaman that included language supported by Senators Rob Portman (R-OH) and Jeanne Shaheen (D-NH), which addresses policies involving the energy efficiency of water heaters, commercial refrigerators

and air conditioners and heat pumps. This package is under consideration and various iterations are in development as the negotiations between House and Senate supporters will continue as the two sides pursue enactment in the lame duck session. This is an area with bipartisan support; however, costs associated with government administration and oversight, as well as the pursuit of the proper balance of federal regulation and individual liberty for consumers, continue to make enactment a delicate matter in the limited time availability during the lame duck session, but it may prove to be a fruitful foundation once the new Congress begins its work early in the new year.

“There are opportunities to address energy priorities, which are more naturally viewed through regional lenses rather than as a partisan policy portfolio. With a focus on preserving manufacturing, one such area where there is a center of gravity and measure of bipartisanship is strategic energy efficiency measures. Additionally, lawmakers can unite around policies designed to encourage domestic production as the need continues to come into clearer focus,” said Bill Anaya, counsel at Alston & Bird and a member of its Legislative & Public Policy Group.

b. Oil and Gas

In light of the success of the Gulf oil spill recovery efforts, and given that the ban on offshore activities on the Atlantic and Pacific coasts has expired, there may be some effort to enact a framework for future permit applications. Legislation will be complicated not only by opposition from some states, but also by demands for greater revenue sharing by other states.

The Domestic Energy and Jobs Act aims to increase the leasing of federal land for oil and gas production. In the case of a release of crude oil from the Strategic Petroleum Reserve, the bill would require the Secretary of Energy to develop a plan to increase the percentage of federal lands leased for oil and gas exploration, development and production under the jurisdiction of the Secretaries of Agriculture, Energy, the Interior and Defense by the percentage of petroleum in the Strategic Petroleum Reserve that was drawn down. This bill has passed the House, and approaches that would expand the utilization of federal lands for exploration will continue to face a measured approach in the President’s second term.

EPA’s moves to regulate emissions from coal-fired power plants have led to numerous proposed legislative initiatives. The Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act would suspend many EPA actions while studies of their impacts were performed. The bill passed the House in September, but has not been taken up by the Senate. Bills to protect coal have received favorable treatment in the House and will continue to do so in this session. Additionally, the issue of the regulation and safety of hydraulic fracturing has led to differing legislative proposals. Under existing law, EPA does not have regulatory jurisdiction over certain aspects of hydraulic fracturing. The proposed FRAC Act would give EPA such jurisdiction under the Safe Drinking Water Act while the FRESH Act would maintain jurisdiction within the states. Neither legislative proposal has been reported out of committee. “With the urgency around addressing this increasingly important domestic source of energy, there will be continued keen interest on the part of lawmakers from both parties to legislate in this area to ensure development, domestic security, environmental conservation and safety for the American public,” said Anaya.

c. Energy Tax Provisions and Incentives

Energy tax provisions have been a continuing issue in both House and Senate tax writing committees. In the last lame duck, Congress enacted an extension of existing energy tax provisions as part of a tax extenders bill in the Tax Relief, Unemployment Insurance Reauthorization and Jobs Creation Act of 2010; however, many provisions expired at the end of 2011. With Congress having failed this year to address tax extenders, these issues may be taken up in discussions on the fiscal cliff or tax reform. With President Obama's re-election, it can be expected that his Administration will continue to support and press for the extension of tax credits that support renewable energy and manufacturing.

In the past, Senators Bingaman and Olympia Snowe (R-ME) have been at the forefront of energy tax legislation and have worked to adopt a package of clean energy tax provisions. With the Senators' pending retirement, a new bipartisan partnership will need to be formed. In the past, Sens. Bingaman and Snowe have proposed provisions such as those that would increase and extend tax relief for actions designed to improve energy efficiency, among others. "Considering the state of the nation's budget, it would be reasonable to anticipate elevated levels of already heightened scrutiny for tax relief for investments, particularly with respect to proposals to create any new credits. Each should be considered on their merits and it will be essential to ensure the proper current is generated to enable policy that promotes investments in these areas," said Earl Pomeroy, counsel at Alston & Bird and a former Member of the U.S. House Ways & Means Committee. In the context of deficit reduction, tax reform and other issues (including the desire to avoid deep defense budget cuts), many expiring provisions, including current energy tax credits, are expected to be targeted for elimination (or simply not extended). For this reason, "[i]t would be advisable to pursue sustained education for policymakers regarding existing credits and seek to modify eligibility criteria, as necessary, in order to encourage beneficial business investments or to protect existing treatment for solutions that enhance American economic leadership in the world economy and domestic security for our people," said Senator Blanche Lincoln, special policy advisor at Alston & Bird and a former member of the Senate Finance and Energy Committees.

On the expenditure incentive side—post the Solyndra controversy—there has been legislation that would bar DOE from issuing loan guarantees for renewable energy project applications submitted after 2011 and limit modifications to existing loans. The bill passed the House in September, and there will be continued enhanced bipartisan scrutiny for programs such as these, particularly in the acute budget scenario facing the country.

d. Climate Change

Despite some viewing Hurricane Sandy as a precursor and driver for climate change legislation, climate change is likely only to be considered in the context of attempts to forestall regulations by the EPA. Given the unlikely prospect of enacting changes to outright divest the EPA of authority to regulate greenhouse gas emissions, a focus of efforts among those who seek to limit regulation—by more conservative members of Congress and those with significant constituent interests in these matters—is likely to be the promotion of appropriations provisions to limit the authority of the EPA to expend funds on greenhouse gas emissions measures.

e. Renewable Energy Standard

The national renewable electricity standard (RES) continues to have little chance of gaining approval. In general, any debate going forward is likely to focus on whether incentives or mandates to encourage renewable energy are appropriate or desirable. An RES would require a percentage of electricity to come from renewable energy technologies. More than 30 states currently have some form of an RES, or an alternative energy standard or a renewable electricity goal, but that has provided a patchwork of different policies, some more effective than others. The House passed a 15 percent by 2020 RES (with up to four percent of that from energy efficiency) in the 111th Congress, but the legislation failed to achieve the 60 votes necessary in the Senate—and will continue to face an uphill battle in the 113th. With President Obama’s re-election, we can expect that he will continue to press for the adoption of legislation designed to mandate that 80 percent of the nation’s electricity comes from clean sources by 2035, but garnering the necessary votes to enact such a program would be challenging to find in the present economic circumstances.

f. Carbon Capture and Storage

Coal remains the leading 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, 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. With President Obama’s re-election, he will look to leverage his administration’s \$5 billion investment in clean coal, and continue to seek policies designed to promote technologies to capture carbon pollution.

As energy policy in the United States has focused on assuring a secure supply of energy, lowering costs, and conserving the environment, government programs will continue be contemplated or developed to improve the efficiency with which energy is utilized, to promote the domestic production of conventional energy sources, and to enable new energy sources. Implementing such programs will both enjoy support and face opposition because of varying perspectives and geographic priorities among policy makers. The proper role of government involvement is central to these considerations, and market players are wise to be engaged in the dialogue in a manner that addresses these vantage points.

III. TAX POLICY

a. “Taxmageddon” – The Expiring Tax Code

The most immediate problem in the tax arena is the expiration of core elements of our federal tax system. The Bush-era tax provisions—including a 15-percent maximum capital gains rate, the current individual income tax structure (with rates ranging from a low rate of 10 percent and a high rate of 35 percent) and estate tax provisions (with a 35-percent rate and an exemption amount of over \$5 million)—the payroll tax holiday, and 40 other provisions of the federal tax laws all expire on December 31, 2012. If unaddressed, these tax increases, estimated to total over \$400 billion, will impact the paychecks of most Americans starting January 1, 2013, as withholding for federal taxes increases—hence the name “taxmageddon.” Add to this the over-100 provisions that have already expired, including many popular individual and business tax provisions, such as the increased AMT exemption amounts and the R&D tax credit (both of which expired at the end of 2011). The lack of certainty in the federal tax system, the constraints this uncertainty may place on business planning and the desire to avoid across-the-board significant tax increases have been cited by both parties as major problems. The looming “taxmageddon” is one element of the impending “fiscal cliff.”

b. Tax Reform and Deficit Reduction

In the 112th Congress, there has been significant discussion and ground-laying work on tax reform, but no clear pathway forward has yet emerged. The background work from the 112th Congress will be helpful to the 113th Congress, but the same issues that stalled tax reform in 112th are likely to remain in the 113th.

During the 112th Congress, Ways and Means Chairman Dave Camp (R-MI) and Finance Committee Chairman Max Baucus (D-MT) have both been seriously engaged in tax reform efforts. These Committees combined held over 20 hearings on tax reform related issues, including rare joint hearings, indicating shared concerns. Chairman Camp released a discussion draft focused on international and corporate tax reform calling for a territorial system (through a 95-percent exemption for active foreign earnings) and a maximum corporate tax rate of 25 percent (to be paid for by elimination of unspecified tax expenditures). The Obama Administration released a framework for business tax reform,¹ which calls for a 28-percent corporate rate generally, with a 25-percent rate for manufacturing. On the international front, President Obama’s framework rejects a move to a territorial system (as unduly incenting U.S. companies to move profits out of the United States) and proposes to impose a minimum tax (at an unspecified rate) on U.S. multinationals’ unrepatriated foreign earnings.

Other proposals emerged in the 112th Congress that continue to be referenced as the basis for tax reform, including the bipartisan Simpson-Bowles proposal, which includes lower rates and base-broadening and recommends a territorial approach to international tax,² and the bipartisan Domenici-Rivlin proposal, which includes a 27-percent corporate rate.³ In addition to these proposals, a number of bills were introduced, the

¹ The President’s Framework for Business Tax Reform, A Joint Report by the White House and The Department of Treasury (February 2012), may be found at <http://www.treasury.gov/resource-center/tax-policy/Documents/The-Presidents-Framework-for-Business-Tax-Reform-02-22-2012.pdf>.

² Proposal of the Co-Chairs of the National Commission on Fiscal Responsibility and Reform (November 10, 2010), *available at* <http://www.fiscalcommission.gov/>.

³ “Restoring America’s Future,” Bipartisan Policy Center, Debt Reduction Task Force, Co-Chairs Senator Pete Domenici and Dr. Alice Rivlin (November 2010), *available at* <http://bipartisanpolicy.org/projects/debt-initiative/about>.

Gang of Six (now the Gang of Eight) worked toward a tax reform and deficit reduction proposal and the Joint Select Committee on Deficit Reduction (the “Super Committee”) tried and failed to reach a consensus on deficit reduction.

The interest in tax reform and deficit reduction will continue in the 113th Congress. While any reform proposal would involve myriad details, the lessons from the 112th indicating the core issues that will confront the 113th Congress include the following:

- What current tax benefits can be politically reduced or eliminated to pay for significant rate reduction and who will be the winners and losers?
- What role should taxes (and tax reform) play in reducing the deficit?
- What process is needed to move forward on tax reform? The failure of the Super Committee indicates the difficulty in trying to bypass the normal congressional committee structure.

c. Tax Priorities for President Obama

As part of his campaign, President Obama has reiterated that wealthier Americans should face higher tax rates, but that current tax rates should be preserved for most Americans. Thus, during any lame duck discussions, as well as in the next year, we can expect a re-elected President Obama to oppose across the board extension of the Bush-era tax rates and to focus on proposals aimed at the “middle class.” His past budget proposals, as well as his recent framework for business tax reform, provide a guide to what we can expect in the second term. Thus, for example, his business tax reform proposal starts with the presumption that “we should eliminate all tax expenditures for specific industries, with the few exceptions that are critical to broader growth or fairness.” While many of the revenue raisers are left to be determined, the proposal does identify some specific revenue-raising targets, including LIFO, accelerated depreciation, various oil & gas expenditures, a BOLI/COLI proposal and other insurance product proposals (presumably those included in the President’s Fiscal Year 2013 Budget Proposal), as well as more general proposals—e.g., to consider reducing deductions for interest expense to reduce the tax-incentives for debt-financing.

In his first term, President Obama did not fully engage in tax reform, and it is unclear that he will do so in a second term.

In terms of deficit reduction, an Obama Administration is expected to continue to include raising taxes as a priority, along with possible spending reductions.

President Obama will be looking at a new team at Treasury, including a replacement for Secretary, as Timothy Geithner is not expected to continue in the second term.

IV. PRIVACY AND DATA SECURITY

The preeminent privacy issue facing the House Energy & Commerce Committee, Senate Commerce Committee, Federal Trade Commission (FTC) and Department of Commerce (DOC) during the 113th Congress will be defining the proper role of the federal government in setting and regulating baseline data privacy standards for all businesses operating in the United States. Under a second term for President Obama, the administration is expected to renew calls for Congress to enact baseline privacy and data security legislation, while the National Telecommunications and Information Administration (NTIA) of the DOC will continue its efforts to craft voluntary codes of conduct for businesses to adopt, particularly in the area of mobile application privacy.

The key question in data privacy legislation to be considered in the 113th Congress is whether Congress, the administration and industry stakeholders can agree upon statutory language that would purport to regulate the collection, use and disclosure of consumer data by businesses operating in the United States without creating significant new burdens on commerce—including mobile and online commerce—that could impact revenue and job growth. Former Senate Commerce Committee Counsel for Chairman John McCain (R-AZ) and current Alston & Bird Partner Paul Martino advises, “It is extraordinarily difficult for Congress to craft workable statutory language in the static form of federal legislation to address what is essentially an evolving and dynamic communications relationship between businesses and their customers. By the time Congress can define the proper scope of a bill addressing a particular business practice, businesses have often evolved their practices beyond the contours of those definitions and the bills become backward-looking. This creates compliance risks for, and potentially chilling effects on, innovative new practices by retail, financial, Internet-based and other consumer-facing businesses that want to take advantage of the latest mobile, social media and other online technologies to better serve their customers.”

Within the broader ambit of data privacy legislation, bills concerning particular privacy concerns—location privacy, mobile application privacy and children’s privacy—will likely be re-introduced by Members of Congress and further hearings on them are anticipated. Some of these bills could also be used to influence ongoing efforts at the FTC to promulgate updated regulations under the Children’s Online Privacy Protection Act (COPPA) and at NTIA to craft self-regulatory rules on mobile application privacy. With respect to legislation outside of the Senate Commerce and House Energy & Commerce Committees, which have oversight authority over the FTC and DOC, the House and Senate Judiciary Committees are expected to continue their efforts to enact reforms to the Electronic Communications Privacy Act (ECPA).

At the outset of the 113th Congress, however, attention of these committees will likely first go to re-introducing and passing data security legislation that stalled during the 112th Congress. In the 112th Congress, the Senate Judiciary Committee reported three data security bills, the Senate Commerce Committee considered (but did not report) its own data security bill, and the House Energy & Commerce’s Commerce, Manufacturing and Trade (CMT) Subcommittee reported a data security bill to the full committee. Despite this progress in the 112th Congress, data security bills have been in development, considered and reported since 2005 without ever passing Congress. Given the political challenges to date with enacting data security legislation as a standalone bill, we expect that the provisions of existing data security bills will continue to be offered by the Chairmen of the Senate Judiciary and Commerce Committees to any cybersecurity legislation taken up in the Senate, including in the upcoming lame duck session if cybersecurity legislation resurfaces.

a. Privacy Legislation

Current Senate Commerce Committee Chairman Jay Rockefeller (D-WV), a leading proponent of data privacy legislation, is expected to continue his strong support of “comprehensive” privacy legislation and pursue its passage in the Senate despite the narrowed margins under which the committee will operate in the 113th Congress and the anticipated opposition to this agenda by incoming Ranking Member Jim DeMint (R-SC). Similar to Senator DeMint, the Republican leadership of the House Energy & Commerce Committee has traditionally favored a business self-regulatory approach to data privacy issues that relies on reinforcing industry best practices and does not call for significantly expanding federal government regulation of businesses’ customer data practices. The Committee is expected to continue its series of hearings examining various aspects of data privacy practices before considering any legislation. Additionally, Members of the Senate Commerce Committee and House Energy & Commerce Committee may continue their review of online marketing practices, particularly the practices of data brokers, and the progress that industry is making in its efforts to improve the transparency with current consumer data collection and use practices.

As noted in the overview above, the Obama Administration in its second term is expected to continue to call upon Congress to enact baseline privacy legislation while simultaneously having NTIA proceed with its multistakeholder meetings to craft voluntary codes of conduct on particular privacy practices, such as mobile application privacy. It is likely that any draft comprehensive privacy legislation from Democratic Members in the 113th Congress will closely reflect the recommendations of the White House blueprint for privacy regulations and/or the final staff report of the FTC on proposed privacy principles for businesses, both of which were published in 2012.

b. Electronic Communications Privacy Act (ECPA) Reform

In the 112th Congress, the Senate Judiciary Committee continued its review of the Electronic Communications Privacy Act (ECPA), with Chairman Patrick Leahy (D-VT) introducing reform legislation designed to update the law following the many significant technological and communications developments that have taken place since the Act’s original passage in 1986. Given the broad interest of industry, academics and public interest organizations, the Judiciary committees of the Senate and House are expected to continue their efforts to enact ECPA reform legislation in the 113th Congress. With such legislation, businesses would like to ensure that IP-based services, cloud computing and other recent communications technologies are protected from unwarranted government access, while law enforcement would like to preserve statutory crime-fighting tools they believe are necessary in today’s communications environment. While affected businesses increased their attention to ECPA reform in the 112th Congress, legislation will need to be addressed carefully as the potential unintended consequences from misguided proposals could have significant effects on the way businesses offer, and consumers use, innovative communications and other information technology services.

c. Data Security Legislation

We expect continued efforts by Members in the 113th Congress to introduce and enact data security legislation that would require strengthened security standards for consumer data and consumer notification following a breach of security. This legislation has been pursued by many committees of Congress since 2005 and, in 2012, both the White House and the Federal Trade Commission called upon Congress to enact federal legislation to create uniform national standards in the face of existing, but disparate, breach notification laws in 46 states and three federal jurisdictions (including the District of Columbia).

In the 112th Congress, data security legislation continued to progress in the Senate and House as it had in the previous three Congresses, but has not yet reached a level of consensus to enable its passage as a standalone bill. The Senate Judiciary Committee reported three data security bills from committee, including those of Chairman Leahy, Senator Feinstein (D-CA) and Senator Blumenthal (D-CT). The Senate Commerce Committee considered a data security bill sponsored by Consumer Protection Subcommittee Chairman Pryor (D-AR) and cosponsored by full committee Chairman Rockefeller, but it did not report a bill. The House Energy & Commerce Committee's CMT Subcommittee Chairman Mary Bono Mack (R-CA) sponsored and successfully reported the SAFE Data Act to the full committee, where it stalled due to ongoing concerns with its breadth from businesses. We expect each of these Members to continue to pursue passage of a data security bill in the 113th Congress.

Despite the inability of standalone data security legislation to gain traction over the past several Congresses, we anticipate that efforts will continue to be made to pass it as part of other must-pass legislation. For example, during the attempted Senate floor consideration of the Cybersecurity Act in July 2012, both Chairman Leahy and Chairman Rockefeller filed amendments that would have attached data security legislation to the Senate's cybersecurity bill before passage. We anticipate that these chairmen will continue this effort in the upcoming lame duck session if cybersecurity is taken up on the Senate floor or in the 113th Congress if consideration of cybersecurity legislation is pushed over to the next Congress.

V. CYBERSECURITY

One certainty as we enter the new year is that cybersecurity issues will be on both parties' agendas for the 113th Congress, and that is a reality that nearly every industry sector must prepare for, whether it is agriculture, chemical, defense, energy, financial services, health care, information technology, manufacturing, retail, telecommunications or transportation. As we have seen, the Republican-led House in the 112th Congress passed multiple cybersecurity bills while the Senate found itself with significant, but divided, support for Democratic or Republican versions of comprehensive cybersecurity legislation. Furthermore, the Obama Administration drafted its own version of comprehensive legislation that it called upon Congress to enact, and has threatened to issue an executive order if Congress cannot pass a cybersecurity bill. Given these developments across the federal government, there appears to be a critical mass of bipartisan support for taking action on cybersecurity in the 113th Congress, and the only real questions that remain are what form of action will be taken and when might it occur. Those are questions that businesses must consider and be prepared to address in planning for the next Congress.

Congressional proponents of cybersecurity legislation, the defense and homeland security communities, and the White House continue to push for the passage of a bill. The President's announcement that he will issue an executive order (EO) instructing executive branch agencies to take certain actions and establish certain standards for security networks has prompted congressional bill sponsors to increase their visibility and call for action in the lame duck session. Although leading Senate Democrats have encouraged the President to issue an EO, Republicans and the business community are aligned in their opposition to the EO.

Administration officials have stated that a draft EO is being circulated among the relevant departments and agencies responsible for implementation. However, the contents of the EO have yet to be disclosed. Recently, House and Senate professional staff were briefed by the White House. "It appears that the EO will closely resemble the most recent version of the Lieberman-Collins bill, S. 3414," stated Jeff Sural, former DHS deputy assistant administrator and now counsel in Alston & Bird's Legislative & Public Policy Group. The most prominent provisions of that bill include voluntary regulations for industry created through existing specific industry standard-setting groups at the Department of Homeland Security or other relevant departments. The bill also includes a process for government-private sector information sharing.

However, the EO will be limited in scope by not being able to provide incentives, such as liability protections to companies complying with the standards. Additionally, the EO cannot remove the statutory barriers (antitrust, for example) that impede information sharing between the private sector and the government, and within the private sector. Therefore, there remains some compulsion to legislate in the area.

House bill sponsors, House Permanent Select Committee on Intelligence Chairman Mike Rogers (R-MI) and Ranking Member Dutch Ruppersberger (D-MD), continue to voice preference for their legislation, H.R. 3523, the "Cyber Intelligence Sharing and Protection Act of 2011." Preferred by the business community, the Rogers-Ruppersberger bill focuses on the sharing of cyber-threat information among private sector entities and between the private sector and government. The bill specifically amends the National Security Act of 1947 to add provisions concerning cyber-threat intelligence and information sharing, and to define "cyber-threat intelligence." It also requires the Director of National Intelligence to establish procedures to allow intelligence community elements to share cyber-threat intelligence with private-sector entities and then authorizes a process that regulates the use and protection of shared information. Privacy and civil liberty groups continue to oppose this approach.

President Obama will likely issue the EO and continue to support the broader, comprehensive goals of the Senate legislation to authorize the Department of Homeland Security to define what is “covered” critical infrastructure and issue regulations with cybersecurity requirements. He would prefer to place the federal government in the central position of receiving information from private entities, rejecting the idea of allowing private-to-private information sharing. However, issuance of the EO may relieve some of the pressure on Congress to pass legislation and the consideration of a cyber bill will slip to the 113th Congress.

VI. HEALTH CARE

While health care issues took a bit of a back seat in the 2012 campaign to broader concerns about jobs and the economy, this was, perhaps, the most consequential election for the future of health care in our nation's history. Not only did the future of the Affordable Care Act (ACA) hang in the balance, but the two candidates presented sharply divergent views on the future of the Medicare and Medicaid programs—views that, in either case, would very likely have been acted upon as part of an effort at long-term entitlement reform and deficit reduction.

With President Obama's re-election, and a status quo congressional election, a great deal of the uncertainty is removed. The Affordable Care Act will remain the law of the land and implementation will move forward. Medicare almost certainly will not be moving to a "premium support" model through the balance of the Obama Administration, and Medicaid will not be block-granted to the states.

Within those operating parameters, however, significant questions remain for every sector of the industry beginning in the lame duck and likely extending through the entire 113th Congress. The President has indicated that deficit reduction is the first item on his second-term agenda and that will likely have a significant impact on Medicare and Medicaid—and possibly the ACA, as well.

a. Lame Duck

An agenda likely to be dominated by discussion of all the elements of the "fiscal cliff"—expiration of the Bush tax cuts, sequestration, the sustainable growth rate (SGR) and tax extenders—could be further clouded by the need to deal with disaster assistance for the states impacted by Hurricane Sandy. It is unlikely any of these issues will be dealt with in a comprehensive way in the few weeks available during the lame duck; however, even a short-term extension of the SGR—at a cost of over \$20 billion for one year—will leave provider groups, pharmaceutical companies, insurers and others exposed to potential cuts to offset the cost.

In addition, efforts to reconfigure sequestration, while not likely to result in immediate cuts to Medicare and Medicaid, could result in much larger cuts down the road than currently required. Medicaid was held harmless, and Medicare providers face a two-percent reduction, under sequestration. Efforts to mitigate the impact of sequestration on defense could result in larger cuts to those programs, depending on the amount of additional revenue needed to help offset reductions in cuts to defense.

b. Affordable Care Act

While the law will now almost certainly survive, having run the gauntlet of challenges to its legitimacy, major questions still remain about its future as implementation moves forward, including:

1. **Set-up of the exchanges** – With the Supreme Court challenge behind us and repeal efforts having failed, how will Republican-leaning states that earlier sought to slow down implementation by refusing to set up state-based exchanges respond? Will they continue down the path of ceding responsibility for this function to the federal government? CMS has set a deadline of November 16 for states to notify them of their intent to move forward, purposely allowing a window after the election for states to act.
2. **Medicaid expansion** – With the Supreme Court decision having effectively made the Medicaid expansion optional for the states, how will Republican governors who previously resisted the expansion respond? Will Southern governors, those in more solidly Republican territory and those with national ambitions

continue to refuse the expansion? Will Republican governors in more Democratic-leaning states feel pressure to accept the initial 100-percent federal match, scaling back to 90 percent? Will these same governors negotiate for greater flexibility in implementing changes to Medicaid designed to reduce costs and improve care as a condition of participating in the expansion?

3. **Legislative changes** – In the 112th Congress, there was very little serious discussion of legislative fixes to the bill as Republicans in Congress pressed the case for full repeal and Democrats largely sought to fend off the attacks. With full implementation looming in 2014, there is likely to be some thawing of that freeze, with Democrats looking to head potential problems with the roll-out and Republicans looking for opportunities to reshape the bill.

Among the provisions likely to face the greatest pressure for repeal is the controversial Independent Payment Advisory Board (IPAB), a 15-person board charged with developing proposals to reduce the growth of Medicare spending if certain growth targets are exceeded. The President pressed for its inclusion in the ACA in the face of universal Republican opposition and significant skepticism among many Democrats.

4. **Delayed implementation** – With deficit reduction efforts likely to dominate the agenda, ACA, with its \$100-billion-plus annual price tag, will certainly be part of the discussions. Having failed to repeal the law, Republicans may push to delay its implementation for a year as part of any compromise on budget issues.

Democratic lawmakers have long believed that the key to improving the law's public standing is to get the tax credits flowing and begin the coverage expansion; facing a traditionally difficult political environment in 2014 as the party in power with a second-term President, they will strongly resist such efforts. When faced with the choice of exposing Medicare beneficiaries to greater cost-sharing, along with legitimate questions about whether the infrastructure—federal and state exchanges—will be ready in time, though, it is possible they could acquiesce.

As those questions are sorted out, the health care community is expecting significant regulatory guidance on major issues such as the Essential Health Benefits package, operation of the exchanges and details on the Supreme Court-altered Medicaid expansion.

While the law will almost certainly now survive, it is almost certain to remain a political and policy flashpoint in the 113th Congress and beyond.

c. Medicare

While the kind of wholesale changes to the structure of the program envisioned by a Romney/Ryan Administration are likely off the table, the program will almost certainly face continued pressure, as lawmakers seek to mitigate the impact of sequestration on defense, reduce the long-term federal budget deficit, and begin to address the solvency issues associated with the Medicare program.

Possible changes to the program include a laundry list of items considered and scored as part of earlier deficit reduction efforts, such as the Simpson-Bowles Commission and the Joint Select Committee. These include traditional provider cuts, changes to beneficiary cost-sharing to encourage more efficient use of services and continued efforts at payment system reform; in addition, the President has signaled a willingness in past discussions to consider larger changes, such as means-testing benefits and raising the Medicare eligibility age.

Such politically difficult choices would almost certainly have to come as part of a larger, bipartisan deficit reduction package involving additional revenues, as neither party will want to step off the ledge of entitlement reform absent such bipartisan support.

Bipartisan efforts to tighten anti-fraud mechanisms within Medicare are likely to continue, including roll out of predictive analytics technology, as the program seeks to move away from its current “pay-and-chase” model to a model in which technology is used to prevent payment of fraudulent claims at all.

d. Medicaid

Medicaid will also face continued significant budget pressure at both the federal and state level. With block grants off the table, and the Obama Administration’s most significant legislative proposal— to “blend” rate the federal matching rates for traditional, Medicaid, CHIP and the Medicaid expansion—likely off the table because of the need to maintain the initial 100-percent federal match to create an incentive for the expansion in light of the Supreme Court’s decision on the ACA, most changes to Medicaid could well be driven by efforts at the state and federal level to achieve efficiencies through expansion of managed care.

The Centers for Medicare & Medicaid Services (CMS)-run “duals demo” beginning in 2013 could see as many as two to three million “dual eligible” beneficiaries moved into large-scale managed care demonstration projects. The demonstrations have caused great concern on Capitol Hill and among patient advocates because of their scope, as well as concern over the ability of plans to provide care to such vulnerable populations. While there is great hope among some that cost savings can be achieved, the demonstrations will likely continue to receive close scrutiny and could face legislative threats.

In addition, as discussed earlier, governors could well negotiate greater flexibility in moving Medicaid patients into managed care as a condition of participation in the expansion.

e. Health Information Technology (Health IT)

Implementation of Health IT is expected to continue apace, unaffected by the election cycle and results. Eligible professionals and eligible hospitals and critical access hospitals are working toward implementation of certified electronic health records (EHRs), in order to demonstrate “meaningful use” of certified EHRs, under new standards for Stage 1 and Stage 2 of the Medicare and Medicaid EHR Incentive Programs, effective in 2014, and to avoid the Medicare payment penalties for failure to demonstrate “meaningful use,” which will be imposed beginning in 2015. Technological advancements—as well as the need to more efficiently manage health care resources—may also pave the way for increased use of telemedicine in the coming years.

VII. BANKING AND FINANCIAL SERVICES

“In 2000, I believe we did the right thing by providing legal certainty for swaps and bespoke derivative contracts that allowed industries to manage their financial risk more efficiently and effectively. After the financial crisis of 2008, we took a hard look and passed a law that brought those markets under a formal regulatory regime. All pieces of legislation are a work in progress and not a work of art and Dodd-Frank, of which I was intricately involved, is no different. I suspect that Congress and the President will engage in strategic changes to Dodd-Frank to ensure that market participants retain the ability to access risk management markets in a cost-efficient way.”

– Former Chairman of the Senate Agriculture Committee and Member of the Senate Finance Committee, Blanche Lincoln (D-AR), Special Policy Advisor at Alston & Bird

Perhaps the most urgent task for the financial services industry, post-election, will be to refocus its efforts on navigating (and in many instances, minimizing) the sweeping provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). This could manifest itself in the form of one or more broad technical corrections bills, or through a more piece-meal series of legislative efforts initiated by various industry groups. A frequently expressed notion in the press has been the suggestion of the possibility of complete repeal of Dodd-Frank. However, most industry experts find this outcome unlikely. Dodd-Frank is now two years old and many of its rulemaking mandates and structural changes have already been accomplished. The OTS is dead; a new regulatory authority—the Bureau of Consumer Financial Protection (CFPB)—has been in operation for more than a year; and stricter capital requirements for banks are no longer a topic of debate, but a legal reality. Rather than a complete repeal of Dodd-Frank, meaningful regulatory relief in 2013 will be the result of lawmakers and financial institutions crafting and prioritizing amendments to the 2010 financial reform law.

There are several highly publicized criticisms of Dodd-Frank that are likely to shape legislative efforts and the supervisory role of federal regulators in the immediate year ahead and beyond. Changes to the structure and authority of the Financial Stability Oversight Council (FSOC) have been urged publicly by policymakers, including the replacement of the Treasury secretary as its head with an independent leader, and vesting the FSOC with greater authority for the body to resolve differences among federal agencies. There is also a consensus building that a guiding principle in all Dodd-Frank reforms is that small and mid-size financial institutions should be supervised and examined by regulators differently than their larger counterparts.

One of the largest criticisms of Dodd-Frank, however, is whether the legislation has accomplished its stated mission of ending “too big to fail,” the phrase that has been coined to refer to financial institutions that are perceived to be so large and interconnected that their failure would destabilize the U.S. economy. Proponents of the legislation, including its principle architects, continue to urge that the act specifically outlaws future taxpayer bailouts of a failing financial institution, while detractors argue that the largest U.S. banks are larger now than they were pre-financial crisis, and that Dodd-Frank has “institutionalized” taxpayer bailouts through the creation of the “Orderly Liquidation Authority.”

The political and theoretical debates inspired by Dodd-Frank aside, the 2013 developments of most immediate concern and practical significance to regulated financial institutions include stricter capital requirements, product limitations and the pro-consumer rulemaking activities of the CFPB.

a. Derivatives/Swaps Market Regulation

Dodd-Frank includes extensive provisions to regulate the swaps market. The primary goals of the provisions are to (i) regulate the biggest participants in the market, (ii) require clearing of standardized swaps and (iii) bring transparency to swaps trading.

The legislation's goals are accomplished through a number of measures, including registration of swap dealers and major swap participants (entities whose swaps activity is significant enough to pose risk to the financial system); business conduct standards for registered entities; mandatory clearing of swaps, unless a specific exception applies; execution of swaps through regulated facilities; capital and margin requirements; reporting and recordkeeping requirements; and enhanced enforcement authority for regulators.

The swaps market is largely divided between swaps subject to jurisdiction of the Commodity Futures Trading Commission (CFTC) and swaps subject to the jurisdiction of the Securities and Exchange Commission (SEC). The rulemaking process for both the CFTC and the SEC is behind the schedule envisioned by Congress, and the agencies have issued numerous orders or interim guidance to address uncertainty in the market resulting from delays in finalizing the rules. Thousands of comments on proposed rules have been filed by market participants, industry trade organizations and regulators, among others.

While many market participants question whether the swaps provisions in Dodd-Frank will improve the functioning of the swaps market or reduce systemic or other risks to the financial system, there is no doubt that the legislation and related rules will significantly impact the market. Swap dealers and major swap participants have spent and will continue to spend significant resources to comply with the new requirements. Participants will have to establish new relationships to effect clearing of swaps. SEC and CFTC reporting companies that take advantage of an exception to the clearing requirement for end-users of swaps will need board approval to do so. Many companies are expending significant resources to assess whether the transactions they engage in will be considered swaps under Dodd Frank and, if so, the extent of their compliance requirements. Market participants will have to reassess the cost of engaging in swaps transactions, and some may change the nature of their swaps activities so as to stay outside the registration requirements. Market participants are also concerned about the consequences of making a wrong, albeit good faith, judgment about the application of the new rules. As swap parties continue to assess the application of Dodd-Frank and related rules to specific circumstances in their day-to-day business, the uncertainty in the market will likely increase, which may result in a curtailment of market activity.

b. Basel III: Increased Capital Standards

The Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency are working to implement new capital standards for financial institutions in the United States so as to comply with international standards set by the Basel Committee on Banking Supervision ("Basel III") and certain changes to existing standards required by Dodd-Frank. These new capital rules, which will receive significant attention within the financial services industry over the coming year, are intended to establish a rigorous capital framework for banking organizations to address shortcomings in capital requirements that became apparent during the financial crisis. Regulators recently extended the comment period on proposed rules to replace existing capital standards that were issued in July of 2012. Among other things, the proposed rules would require all banking organizations with total consolidated assets of \$500 million or more to increase the quantity and quality of capital required by proposing a new minimum common equity tier 1 ratio of 4.5 percent

of risk-weighted assets and a common equity tier 1 capital conservation buffer of 2.5 percent of risk-weighted assets, and raise the minimum tier 1 capital ratio from four percent to six percent of risk-weighted assets. There have been significant concerns raised regarding the impact of the Basel III standards on smaller institutions and community banks, including that the new standards may reduce lending by smaller institutions.

c. Volcker Rule: Limits on Proprietary Trading by Financial Institutions

Dodd-Frank contains provisions intended to restrict the ability of banks to engage in proprietary trading that is viewed as risking the financial stability of the institution. Specifically, “proprietary trading” is defined by Dodd-Frank to mean engaging as a principal for the trading account of a banking organization or supervised nonbank financial company in any transaction to purchase or sell, or otherwise acquire or dispose of (i) any security; (ii) any derivative; (iii) any contract of sale of a commodity for future delivery; (iv) any option on any such security, derivative or contract; or (v) any other security or financial instrument that the federal regulators may determine by regulation. A proposal to implement these restrictions, known as the “Volcker Rule,” was issued in 2011 and the statutory deadline for issuing the final rule (July 2012) has passed. A final version of the rule is expected to be issued in the next few months. Notably, the proposal was the subject of significant criticism for failing to adequately address the risks associated with proprietary trading and for containing too many loopholes and exceptions. Given that the statutorily mandated deadline for adoption has passed, regulators are under significant pressure to finalize the rule, in some form, in the immediate future.

d. Consumer Financial Protection Bureau Acts Aggressively to Fulfill Its Statutory Mission

Dodd-Frank created the CFPB and provided it with regulatory, supervisory and enforcement authority with respect to federal consumer financial laws and entities that provide consumers with financial products and services. Since the CFPB launched its operations in July 2011, it has used its multiple authorities and moved aggressively to protect consumers and implement provisions of Dodd-Frank. The Bureau has, among other things, (i) held numerous field hearings across the country to hear about consumers’ experiences with financial service providers; (ii) developed financial education tools that it has made available to the public on the CFPB’s website; (iii) begun to fulfill its statutory mandate to write rules to implement provisions of the Dodd-Frank Act, including by proposing rules to reform the mortgage market, defining the entities that will be subject to its nonbank supervision program and issuing rules to govern consumer-initiated funds transfers to foreign recipients (“remittance transfers”); and (iv) taking aggressive enforcement actions against financial institutions that used deceptive marketing techniques, which required them to pay civil money penalties and to refund significant sums to consumers. We expect the CFPB to take additional enforcement actions in the coming months and the CFPB has made clear that credit card companies and their service providers that use deceptive marketing techniques to convince consumers to purchase “add-on” products (e.g., credit monitoring) are a prime target for enforcement. The CFPB will also continue to work to implement provisions of Dodd-Frank and is expected to, among other things, issue several new rules pertaining to the mortgage industry. Notably, the CFPB’s first rule, which governs remittance transfers, has created considerable compliance challenges for financial institutions that transfer funds for consumers to foreign recipients. The rule contains numerous requirements that are inconsistent with the operational realities of existing funds transfer systems, and despite efforts to educate the CFPB on the challenges the rule creates (including the likelihood that smaller institutions may discontinue such services), the CFPB has been unwilling to acquiesce or offer any notable relief to address financial institutions’ significant concerns. This first major rulemaking by the new agency likely signals an aggressive approach that the financial services industry can expect in future rulemakings.

VIII. FOREIGN POLICY

In his first term, President Obama focused overwhelmingly on the economy and health care. The foreign and defense policy issues that he addressed tended to be essential ones, such as the wars in Iraq and Afghanistan, terrorism and the major power relationships. Having been re-elected after a campaign that was inordinately concentrated on the continuing economic crisis, the President is not expected to increase his concentration on foreign affairs in the coming four years. For many, if not most, countries, commanding Washington's attention will remain a daunting challenge. The U.S. economy is going to impose conditions on foreign policy, so the administration will be confronted by the need to manage both fiscal limits and expectations.

Senator Bob Dole stated on the morning after the elections, "No one can overemphasize the primacy of the economic crisis in President Obama's 2012 mandate. Foreign crises will undoubtedly arise and demand considerable attention, but I don't expect major foreign policy initiatives." Dole continued, "Instead, the President is likely to remain in 'management' mode—handling the drawdown in Afghanistan, continuing the war on terror, keeping a watchful eye on Iran and seeking stability elsewhere in the Middle East."

Obama is expected to continue to emphasize transnational issues (such as nuclear proliferation, terrorism, narcotics trafficking, empowerment of women, energy diversification and protection of the environment) in addition to direct state-based menaces such as Iran, North Korea and other rogue regimes. As the President's first term demonstrated, a corollary of this emphasis is a reliance on multilateral institutions (especially the United Nations) and direct interaction with U.S. adversaries, together with a decreased focus on military strength, to achieve the nation's foreign policy objectives.

a. Afghanistan and the War on Terror

Barring unforeseen circumstances, the highest foreign policy priority during the second Obama term will be the continued prosecution of the war in Afghanistan. While strongly committed to a 2014 withdrawal of troops, Obama has stated that he and his administration will constantly reassess whether the drawdown of the 68,000 U.S. uniformed personnel should remain on target.

Obama has frequently cited the 2011 killing of Osama bin Laden by special operations forces and the administration's emphasis on drones in combatting terror as major foreign policy accomplishments during his first term. This emphasis on operations by elite forces and drone-centric warfare is expected to increase still further during the next four years.

b. Promote Stability in the Middle East

The world will be watching as President Obama formulates second-term policies toward a region fraught with centuries-long tensions and in new upheaval in the ongoing Arab Spring. One of the President's highest priorities must be to deal with the civil war in Syria, where more than 30,000 have been killed and more than one million civilians displaced. He must also devise and revise programs to promote stability and conditions in which democracy can thrive in Egypt, Libya and other countries affected by recent revolutions.

The Obama Administration has already embarked upon a more aggressive attempt to organize and support the Syrian opposition. This should become a source of (rare) bipartisan agreement in Washington, and it will continue to demonstrate the administration's penchant for developing multilateral responses to crises similar to the approach taken during the revolt against the Ghaddafi regime in Libya.

Iran's nuclear weapons ambitions also loom large. The administration maintains that it is observant and that it will not under any circumstances allow Iran to obtain such weapons, while critics worry that the President has failed to draw a deterrent "line in the sand" to protect the United States, Israel and their interests from grave harm by the Tehran regime.

In Obama's second term, the Middle East peace process is likely to remain central to U.S. policy in the region. Lastly, in the wake of the killing of U.S. officials (including the U.S. Ambassador to Libya) in Benghazi on September 11, 2012, the administration and Congress must continue to identify and try to remedy flaws in the provision of security for U.S. personnel in hotspots across the globe. The Benghazi incident will continue to make this issue a high priority in U.S. policy circles, but it remains to be seen whether Obama's electoral victory will cause his team's controversial mischaracterization of the killings (as spontaneous, rather than as a planned terrorist attack) to recede from Congressional attention. (See "*Congress*" below.)

c. Major Power Relations

President Obama ascribes stable, productive relations with China and Russia as important to his ability to focus on ending the United States' economic woes. As in his first term, he is likely to continue to tread cautiously with these major powers, which can, on some critical issues, be strategic adversaries rather than partners of the United States. Obama has already built the foundation for a de facto containment strategy toward China, as the so-called "pivot" to Asia has redeveloped security ties in the region while cultivating an economic component in the Trans-Pacific Partnership FTA. The test for Obama will be to not abandon this effort in the face of looming budget cuts; while the test for other regions will be the degree to which new U.S. commitments in Asia may necessitate drawdowns elsewhere. Obama's "reset" to Russia will likely enter the history books with the return of President Putin to the Kremlin, but the White House will continue useful bilateral mechanisms put in place during the first term, seek to expand trade, and work with Moscow on critical issues, such as Iran. Under the increasingly watchful eyes of congressional Republicans, Obama will also try to ensure continued successful implementation of the new START treaty with Russia—the passage of which constituted a significant achievement in his first term. Expect a firmer stance on human rights and continued implementation of missile defense over Russian objections.

During the election campaign, Obama pledged tougher policies to curb China's unfair trade practices—particularly those that cost American jobs—but, in his first term, he steered a careful course that emphasized stability and moderation in relations with Beijing. Perhaps the key variable in the President's new term will be the performance and policies of China's new leaders. Washington remains hopeful that a political thaw will accompany Beijing's increasing economic openness.

Regardless of which party controls the White House or houses of Congress, Washington's closest traditional allies are the major powers of Western Europe. D.C. policymakers remain in close consultation with Britain, France, Germany and other nations in the region as the Euro-crisis continues to unfold. Collapse of the euro and/or spiraling financial chaos in Eurozone countries could create unwelcome unrest in the U.S. economy.

d. Congressional Support for Democracy Abroad

In the Senate, the Republican minority will benefit from its increased numbers on a variety of foreign and defense policy matters, although the departure of Joe Lieberman (I-CT) denies it an additional vote on many issues, especially those before the Armed Services Committee. In the Senate and House, Republicans can be expected to resist administration efforts to effect further cuts in defense spending. In addition to numerous individual, constituency-based objections, Republicans will likely attempt to save major programs and capabilities targeted by the administration for elimination or deep cuts. These may include shipbuilding, the number of active-duty soldiers and intelligence resources. Another focus of Republican advocacy is likely to be attempts to increase U.S. missile defense capabilities—within the United States, on the high seas and at land-based installations abroad.

Republicans in the Congress are also likely to continue to thwart administration efforts to pass a number of pending international treaties. While most of these are international conventions on labor and environmental issues, the most notable is the Law of the Sea treaty, passage of which both Obama and former President George W. Bush supported during their years in office. Earlier this year, 32 Senate Republicans pledged to oppose the treaty, even as Senate Foreign Relations Committee (SFRC) Chairman John Kerry (D-MA) vowed to continue the Democrats' fight to pass it. With the latter's numbers now diminished, a renewed effort at passage is not anticipated.

An additional focus for congressional Republicans may lie in stronger support for human rights in emerging democratic nations, especially those freed in the Arab Spring. Republicans and Democrats whose records already include support for political rights and civil liberties can be expected not only to encourage the administration to increase "nation-building" in these countries, but also to criticize the administration when, in their view, it is insufficiently censorious of China, Russia, Pakistan and other rights abusers and corrupt actors. At the time of the elections, Congress remained seized of the Benghazi killings (see "*Middle East*" above) and the administration's questionable handling of their public aftermath.

On the Senate Armed Services Committee, James Inhofe (R-OK) succeeds John McCain (R-AZ), whose tenure as Ranking Member is expiring. On basing, personnel, spending and related issues, Inhofe is known as a strong and effective advocate for the military. Bob Corker (R-TN), who is expected to succeed departing Ranking Member Richard Lugar (R-IN) on the SFRC, is a notably industrious moderate conservative who, as demonstrated by his support for the START treaty with Russia during the first Obama term, is expected to continue to be results-oriented and highly cognizant of the need for the committee and the Senate as a whole to meet real targets.

Continuing in the new Congress with an appreciable majority, House Republicans are likely to remain more overtly pro-Israel, anti-Cuba, anti-Russia and pro-Caucasus, and anti-China and pro-Taiwan than the Obama Administration. The Foreign Affairs and Armed Services committees are expected to continue under their same leaderships, although the composition of the latter will undergo its third successive major shake-up in membership. Those departing in 2013 include Seapower Subcommittee Chairman Todd Akin (R-MO) and Tactical Forces Subcommittee Ranking Member Silvestre Reyes (D-TX).

IX. INTERNATIONAL TRADE

The second half the Obama Administration's term in office has witnessed an about-face on trade, as the White House belatedly embraced free trade as an engine for growth and domestic job creation. The Obama Administration's approach to trade from 2010 forward has been an *ad hoc* exercise in ratifications, enforcement actions and the continued pursuit of legacy negotiations launched under the Bush Administration. The critical question for President Obama's second term is whether or not the administration will reject such temporizing on trade to develop instead a strategic approach to foreign economic policy.

Potential Developments:

a. Negotiations in Progress

Negotiations on the **Trans-Pacific Partnership Free Trade Agreement (TPP)** should continue apace. The TPP enjoys bipartisan support in Congress, and promises to be the single most valuable free trade agreement, in terms of economic impact, since the NAFTA.

Despite the Obama Administration's "pivot to Asia," regional economies aspiring to join the TPP have found their improved security relationships with Washington have not translated smoothly to better trade ties. The Obama Administration's projected date of October 2013 for conclusion of the TPP negotiations remains highly optimistic, especially considering the difficulties posed by the recent entry of Canada and Mexico.

U.S. policy toward the **WTO** is unlikely to change. Sectoral negotiations on services and an expanded Information Technology Agreement will continue at a slow pace, while the Obama Administration is not likely to spend precious political capital on bold efforts to enervate the catatonic Doha Round, particularly when bilateral or regional arrangements are seen to hold greater potential for near-term economic benefits.

b. United States-European Union Free Trade

On October 18, the joint U.S.-EU High Level Working Group on Jobs and Growth announced their intent to release a forthcoming report recommending that both governments launch comprehensive negotiations aimed at improving the transatlantic economic relationship. Focusing on regulatory harmonization and lacking the strict legal approach of a formal free trade agreement (FTA) negotiation, this development provides a tacit acknowledgement of the political difficulties inherent in the U.S.-EU trade relationship.

U.S. officials have indicated they are aiming for the launch of negotiations by spring of 2013. At this time, however, industry continues to work with the Obama Administration regarding negotiating objectives, as well as understanding the practical form negotiating outcomes may take considering the lack of a formal FTA structure. The summer of 2013 presents a more likely initiation date now that President Obama has retained his office.

c. The BRICs and Emerging Markets

Recent trade policy toward the BRICs and emerging markets in general has been notable only for the episodic, disjointed fashion in which it has been conducted. It remains an open question whether President Obama will link trade policy toward individual BRIC countries to broader regional policies addressing questions of economic integration and geopolitical strategy.

d. Brazil

Current policy toward Brazil is noteworthy for failed initiatives and high-profile disputes. Brazil spurned overtures made this summer by Secretary of State Clinton regarding negotiations on a bilateral investment treaty and free trade agreement. Recent moves by Brazil to raise tariffs on 100 product lines to the country's WTO bindings has sparked concern over regional protectionism, but no U.S. initiatives yet exist seeking further liberalization of regional trade. Expect confrontations with Brazil to escalate and do not anticipate any moves to create a regional free trade area beyond the existing limits set by the NAFTA and CAFTA.

e. Russia

President Obama is expected to continue his policy of "resetting" U.S. relations with Russia and Russia's accession to the WTO and the extension of Permanent Normal Trade Relations (PNTR) to Moscow remain high on the agenda. However, congressional movement on PNTR during the lame duck legislative session remains unlikely. Congress is not expected to act on the PNTR bill until the spring or summer of 2013. Neither Republican nor Democratic camps, meanwhile, have any off-the-shelf proposals regarding free trade with Central Asia; it is therefore not anticipated that the United States would offer the region an alternative vision to the Russia-led Common Economic Space that seeks to expand outward from the existing customs union of Russia, Belarus and Kazakhstan.

f. India

U.S. economic policy toward India has been hampered, in large part, by India's domestic economic malaise and related political turmoil. Bilateral trade and investment policy has thus progressed unevenly. While the Obama Administration succeeded in launching bilateral investment treaty negotiations in June, the sides have failed to meet since the initial round. New Delhi has found a bilateral Economic and Financial Partnership, managed in Washington through the Treasury, as a preferable avenue for cooperation, but this forum does not provide for efforts on the trade agenda. Although the Indian market holds significant potential should an FTA be negotiated, such an effort is not likely to be forthcoming in the second Obama Administration.

g. China

The Obama Administration has diligently coupled its pro-dispute policy with pursuit of a bilateral investment treaty with Beijing. Yet, officials on both sides are now quietly walking back from a stated intention to launch negotiations in 2013. China's own generational power transition, now underway, has certainly complicated the trade relationship. China's leadership changes further reduce the likelihood of BIT negotiations getting underway during 2013.

President Obama believes that negotiation of the TPP offers the greatest potential to limit Chinese economic and commercial influence throughout the Asia-Pacific. While direct bilateral engagement with China may not advance far during the next four years, the TPP should be viewed within the context of overall U.S. trade policy toward China.

h. The Middle East

The political developments of the Arab Spring in 2011 did not engender a creative trade policy response from the Obama Administration. The so-called MERIT plan of late 2011 failed to come to fruition, as it lacked meaningful market access, investment or aid components for transitional Arab Spring governments. A more recent framework agreement on trade reached with the six nations of the Gulf Cooperation Council (GCC) hardly offers brighter promise, as the at-risk economies of the Arab Spring remain outside the ambit of U.S. trade policy.

X. AVIATION (DOT/FAA)

The most significant question facing the Federal Aviation Administration after the election is leadership. After FAA Administrator Randy Babbitt's departure earlier this year, President Obama did not appoint a replacement. Therefore, the FAA will see new leadership.

While departure of Department of Transportation (DOT) Secretary Ray LaHood may be assumed, the former Republican congressman is well-regarded in the administration and has excelled in this role. Sources say there is a possibility he could stay at the helm of DOT another year.

The biggest issue the FAA will have to contend with are spending cuts pursuant to the Budget Control Act of 2011 (or sequestration). While the FAA's operating budget will be reduced, key programs funding the air traffic control equipment and airports will only be slightly impacted. Funding for the Airways and Airports Trust Fund and Airport Improvement Grant programs comes from specific revenues. However, this will set up a scenario where salaries of key FAA employees, most notably the air traffic controllers, may be targeted. The President will not likely agree to a situation that cuts union jobs. Therefore, expect a work-around on the budget cuts or a relief to sequestration that would limit its impact on employees.

Sequestration's biggest impact may be on the future of NextGen—the modernization of the air traffic control system. The program already suffers from congressional skepticism due to what Congress considers a lack of detail from the FAA to inform spending requests. To resolve this funding gap, the industry is likely to see another budget request for a per-flight fee to pay for NextGen. The airlines and private business aircraft operators have objected to this budget request in the past, including in the President's FY12 budget, and Congress has not been willing to authorize the fee.

With the passage of a multiyear FAA reauthorization bill earlier this year, the administration will be busy with implementation of the Act. In Congress, the authorizing committees will focus on their oversight duties, while the appropriations committees will wrestle with sequestration or its replacement.

XI. HOMELAND SECURITY

Although not a prominent issue this election year, several thwarted attacks over the past two years—including the Times Square car-bomb and increased violence along the Southwest border—will require the new administration's attention on homeland security. (Cybersecurity will be the first homeland security issue tackled by the new Congress and administration if legislation is not passed in the lame duck session.) Congress did not pass a homeland security reauthorization bill or a Transportation Security Administration reauthorization bill in the 112th Congress. At this point, the new Congress does not appear poised to make reauthorization a priority. This may change with a significant man-made or natural incident. With the retirement of Homeland Security and Government Affairs Chairman Joe Lieberman, an influential proponent of the department, and the need for reauthorization, legislation passage seems even less likely in the 113th Congress.

The Department of Homeland security will be faced with difficult decisions with the implementation of the Budget Control Act of 2011 (sequestration). The OMB has outlined several areas where significant cuts will be made, including aviation security, immigration enforcement, border security and disaster relief accounts. Spending for customs and border agents, along with TSA workers, will also be affected with possible furloughs and a reduction in hiring in the coming years. This reduction in assets will force the Department to cut certain programs and efforts. The Obama Administration will chose to spend less on deportation and other enforcement programs, including along the Southwest border.

The most pressing and controversial policy issue facing the President and Congress in 2013 will again be immigration reform. The issue has not been addressed since the Bush Administration's legislative proposal failed to win Senate passage in 2007. The recession and increased enforcement along the Southwest border have actually reduced the illegal immigrants from Mexico and Latin and South America. However, pressure continues to mount from the business community, and there is recognition from both parties that reform is needed to ensure workers with specialized skills can work in the United States.

The President has committed to pursuing comprehensive immigration reform, a proposal he could only pursue in a second term due to its controversial nature. The President's proposal will include provisions of the DREAM Act, and provide a pathway for undocumented aliens to pursue citizenship. This approach has been strongly opposed by more conservative Members of the Republican Party in Congress.

Defense

The mandatory spending reductions of the Budget Control Act of 2011 (sequestration) may be delayed and eventually replaced with a less severe budget alternative, but its effects are being felt by the defense industry now. The Defense Department—facing a \$500 billion cut over 10 years under the Act—began preparing for spending cuts earlier this year by instructing programs to propose how they will operate if the reductions kick in on January 2, 2013.

Along with taxes and health care, the Republicans and Democrats could not be further apart on their positions on defense policy and spending.

The President received favorable marks from the electorate in pre-election polls, and made a strong showing during the presidential debates on foreign policy issues. His prosecution of terrorists, including the killing of Osama bin Laden, will strengthen his administration's resolve to carry out their policies.

The President's second term will look much like the first term as far as his defense budget request and his overall policies and plans for the military. His budgets will include reduced spending across the board for the Defense Department. He will focus resources on programs he has used successfully, such as drones and intelligence-gathering technology. Ground forces will likely continue to shrink.

While he has stated that he will continue to focus on attacking specific terrorist threats overseas, the Obama Administration will continue to be reluctant to engage in overseas conflicts like Syria. The administration has advocated in the UN—and won—some of the toughest sanctions on Iran and those will continue through the next term. However, with no foreseeable overseas engagements, a supplemental appropriations request for overseas contingency operations will likely be limited to supporting troop withdrawal in Afghanistan and supporting remaining troops in Iraq.

XII. AGRICULTURE

“I believe that the chances of the farm bill passing in the lame duck session are increased with the re-election of President Obama. Particularly in light of Rep. Cantor’s most recent comments that a farm bill is something that could be on the House calendar during the lame duck. This will require Democrats and Republicans to get past their differences on SNAP (Food Stamps). I believe the President’s re-election means that the lame duck has a better possibility of addressing the major fiscal issues, which may preclude them from having the floor time necessary to pass a farm bill this year.”

– **Former Chairman of the Senate Agriculture Committee, Blanche Lincoln (D-AR),
Special Policy Advisor at Alston & Bird**

Alston & Bird has several veterans of farm bill on our team, including former farm state Members of Congress Senate Majority Leader Bob Dole, former Senate Agriculture Committee Chair Blanche Lincoln, former House Agriculture Committee Member Earl Pomeroy and former House Energy & Commerce Chairman Billy Tauzin. At the staff and technical level, Alston & Bird also has former Senate Agriculture Committee Staff Director Robert Holifield and a robust team of agriculture and environmental lawyers.

In addition to the farm bill, environmental legislation and regulations are increasingly impacting the agriculture industry. In President Obama’s second term, we envision much of the same with regard to increased environmental regulation. This will require a strong voice to communicate to Members of Congress and the administration the impact to the agriculture industry.

During either the lame duck or the first year of the 113th Congress, the farm bill must be reauthorized. While it technically expired on September 30, 2012, given the nature of several programs and congressional passage of a short-term spending bill (H.J. Res. 117), action on the farm bill has been delayed until January 1, 2013. By that time, congressional action will be required to continue existing farm programs on either a short- or long-term basis. This means that either a short-term extension or passage of the farm bill will have to occur during the lame duck session.

On June 21, 2012, the Senate passed its version of the farm bill (S. 3240) with 64 votes in favor and 35 opposed. To date, Speaker John Boehner (R-OH) has not scheduled the House version (H.R. 6083), which passed the House Agriculture Committee, for floor action. During the congressional recess, there have been conflicting media reports that suggest action on the farm bill may or may not occur during the lame duck session.

The Obama Administration has pressed the House to take up its bill and open a path to a conference with the Senate. Prior to the congressional recess, Speaker Boehner has said he does not see enough votes to pass the bill because of conflicts over the level of cuts to the SNAP program (formerly food stamps).

Currently, the House bill contains much larger cuts than the Senate bill. The House Agriculture Committee passed legislation that would reduce SNAP by \$16 billion, while the Ryan Budget would reduce SNAP by \$134 billion. The Senate-passed version of the farm bill makes reductions of \$4.5 billion.

There are a number of possibilities for action on the farm bill during the lame duck session, particularly as congressional leaders continue to feel pressure to address the drought in the Corn Belt. The Obama administration, citing the effects of the drought, will call for quick action and will push against the House Committee's deep cuts to the SNAP program. If the farm bill goes to conference, Senate Democrats will push for smaller cuts to SNAP than the House Committee approved, but may have to accept a bigger cut than the \$4.5 billion provided for in the Senate bill. In the aftermath of Hurricane Sandy, it is possible that Congress could proceed with some form of disaster relief for states impacted along the East Coast. Such a legislative effort could also be a vehicle to attach farm assistance for producers impacted by the drought.

XIII. ELECTION LAW

Our clients increasingly recognize the importance of engaging in the political process and interacting with elected officials and candidates to increase their profile in the public policy arena. Political activity, however, can involve exposure to significant risks. Federal, state and local entities regulate the ways in which individuals and corporations may interact with officials at all levels of government, and it is important that individuals and companies engaged in the political process understand and comply with all applicable regulations.

Communications with public officials on matters relating to legislation or other government action, visits by government officials to corporate facilities, the provision of gifts or entertainment to public officials and financial support for candidates, political parties or issues of public policy are all examples of the type of activity subject to regulation by various jurisdictions. Individuals and corporations choosing to engage in political activity face the risk of significant penalties for failure to comply with various complex regulatory schemes. “Depending on the jurisdiction, criminal and/or civil penalties may be imposed on corporations, their employees or agents. For this reason, corporations must closely monitor political activity and develop internal governance practices that contemplate the totality of political engagement by their executives,” stated Diego Marquez, a senior associate in Alston & Bird’s Political Compliance Practice in Washington, D.C. Indeed, more and more companies are developing and implementing internal policies and procedures to govern political activity and ensure compliance with applicable laws and regulations. Such policies are particularly useful given recent changes in laws that have altered the political activity landscape, particularly with respect to political contributions.

Specifically, on January 21, 2010, the Supreme Court overturned existing precedent and federal law by ruling in *Citizens United v. Federal Election Commission* that corporations may use their general treasury funds to make independent expenditures for communications that directly or indirectly support or oppose federal candidates. More recently, in *American Tradition Partnership v. Bullock*, the Supreme Court struck down a Montana prohibition on corporate political contributions, confirming that the 2010 *Citizens United* decision applies to state and local elections as well. The Court’s decisions have resulted in the reversal of, or significant changes to, similar prohibitions in existing state laws, and additional changes will continue to be made to state laws that conflict with the Court’s decisions.

A divided Federal Election Commission (FEC) has yet to promulgate regulations implementing the Court’s decision in *Citizens United*. Certain restrictions on corporate political contributions remain in place, including federal disclosure rules approved in *Citizens United* and the prohibition on contributions by corporations and labor organizations directly to candidates, and the long-awaited rulemaking is expected to address these restrictions. Moreover, the FEC may try to address additional issues of interest, including, for example, the ability of companies that are foreign-owned or foreign-controlled to make political contributions or independent expenditures. Perhaps most significantly for entities currently engaged in political expenditures, the rulemaking may also address the rise of “Super PACs” and “hybrid PACs” in an effort to more closely regulate their activity.

The Court’s decision in *Citizens United*, and the lack of any rulemaking implementing the decision, has led to the creation of independent expenditure-only committees, or “Super PACs.” These committees may make communications expressly advocating the election or defeat of a clearly identified candidate, as long as the communications are not made in coordination with a candidate or candidate committee. There are currently no FEC contribution or disbursement limitations for independent expenditures, although Super PACs must still register with the FEC and are subject to specific obligations under the Federal Election Campaign Act.

In addition to Super PACs, a recent case before the U.S. District Court for the District of Columbia, *Carey v. FEC*, has led to the creation of hybrid PACs. The District Court for held in *Carey* that a non-connected committee may make both direct contributions to candidates and independent expenditures if it maintains separate bank accounts to separate funds for independent expenditures (subject to the rules applicable to Super PACs), as well as funds for making candidate contributions (subject to general FEC limitations). The court's decision was limited to non-connected committees and did not consider PACs sponsored by a corporation or labor organization, and the FEC has yet to implement the decision by rulemaking or amend its reporting forms to account for the new hybrid PACs.

Super PACs and hybrid PACs should be of particular interest because companies and individuals are beginning to take full advantage of their existence. According to Edward Britan, a senior associate in Alston & Bird's Political Compliance Practice in Washington, D.C., "a party line deadlock among the six FEC commissioners has prevented the FEC from promulgating rules implementing the *Citizens United* decision. Nonetheless, the Commission is considering regulatory options that could alter the existing framework within which Super PACs and hybrid PACs operate. But, until the FEC does take further action, companies are fully leveraging the current legal pathways for making unlimited contributions for independent expenditures." As might be expected, the rise of Super PACs and hybrid PACs has led to an increase in political spending on both sides.

In fact, it is estimated that this election cycle will be the most expensive in the history of our nation. The aggregate spend on behalf of all federal candidates for office this cycle is estimated to be in the \$6 billion range. While the presidential candidates are together expected to spend about \$200 million less than the amount spent four years ago, spending by outside groups is expected to approach the \$600 million range to more than make up for the difference. "Since the 2000 presidential and congressional cycle, there has been a steep and accelerating rise in the cost of political campaigns—yielding a nearly 100-percent markup with this year's \$6 billion price tag. Demands for private funding will continue to bend the arc of this dynamic cost curve upward and point to the need for interested entities to engage in the process. Any private enterprise seeking to make its voice heard, be able to respond to the calls for support and withstand heightened government scrutiny over these activities will need to stay ahead of the campaign finance rules, lobbying laws and ethics guidelines," said Bill Anaya, counsel at Alston & Bird, LLP in Washington and co-leader of the firm's Political Compliance Practice. The unprecedented level of financial activity in this election cycle and the uncertainty surrounding campaign finance regulations make clear that those who wish to engage and contribute to federal campaigns should ensure that they are operating in a manner consistent with current laws and regulations, while also contemplating and preparing for the possibility of significant revisions in the future.

If you would like to receive future *Legislative & Public Policy Advisories* electronically, please forward your contact information including e-mail address to legislative.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

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 Bob Dole
bob.dole@alston.com
202.654.4848

Blanche L. Lincoln
blanche.lincoln@alston.com
202.239.3601

Earl Pomeroy
earl.pomeroy@alston.com
202.239.3835

W.J. “Billy” Tauzin
billy.tauzin@alston.com
202.684.9844

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

William B. Anaya
bill.anaya@alston.com
202.239.3818

Henry J. Birnkrant
henry.birnkrant@alston.com
202.239.3319

Edward Britan
edward.britan@alston.com
202.239.3364

David E. Brown, Jr.
david.brown@alston.com
202.239.3345

Cathy L. Burgess
cathy.burgess@alston.com
202.239.3648

Jennifer L. Butler
jennifer.butler@alston.com
202.239.3326

Jonathan M. Fee
jon.fee@alston.com
202.239.3387

Peter Fise
peter.fise@alston.com
202.239.3842

Larry Gage
202.239.3614
larry.gage@alston.com

Dennis O. Garris
dennis.garris@alston.com
202.239.3452

Maureen F. Gorsen
maureen.gorsen@alston.com
916.498.3305

Joyce Gresko
joyce.gresko@alston.com
202.239.3628

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

Elinor A. Hiller
elinor.hiller@alston.com
202.239.3401

Robert A. Holifield
robert.holifield@alston.com
202.239.3602

Peter M. Kazon
peter.kazon@alston.com
202.239.3334

Susan P. Kennedy
susan.kennedy@alston.com
213.576.1124

Christina A. LaVera
christina.lavera@alston.com
202.239.3511

Diego Marquez
diego.marquez@alston.com
202.239.3003

Paul G. Martino
paul.martino@alston.com
202.239.3439

Karol V. Mason
karol.mason@alston.com
404.881.7494

Rudy S. Missmar
rudy.missmar@alston.com
202.239.3034

Michael H. Park
michael.park@alston.com
202.239.3630

Mark H. Rayder
mark.rayder@alston.com
202.239.3562

Colin T. Roskey
colin.roskey@alston.com
202.239.3436

Marc J. Scheineson
marc.scheineson@alston.com
202.239.3465

Thomas A. Scully
thomas.scully@alston.com
202.239.3459

Donald E. Segal
donald.segal@alston.com
202.239.3449

BJ Shannon
bj.shannon@alston.com
202.239.3344

Regina Sherick
gina.sherick@alston.com
202.239.3383

Eric A. Shimp
eric.shimp@alston.com
202.239.3409

Robert G. Siggins
bob.siggins@alston.com
202.239.3836

Carolyn E. Smith
carolyn.smith@alston.com
202.239.3566

Paula M. Stannard
paula.stannard@alston.com
202.239.3626

Jeffrey R. Sural
jeff.sural@alston.com
202.239.3811

Julie Klish Tibbets
julie.tibbets@alston.com
202.239.3444

Timothy P. Trysla
tim.trysla@alston.com
202.239.3420

Marion Watkins
marion.watkins@alston.com
202.654.4863

Jason M. Waite
jason.waite@alston.com
202.239.3455

David (Max) Williamson
202.239.3223
max.williamson@alston.com

Marilyn K. Yager
marilyn.yager@alston.com
202.239.3341

Joseph E. Yesutis
joseph.yesutis@alston.com
202.239.3350

ATLANTA

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

BRUSSELS

Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE

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

DALLAS

2828 N. Harwood St.
18th Floor
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

4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY

275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
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
202.239.3300

www.alston.com

© Alston & Bird LLP 2012