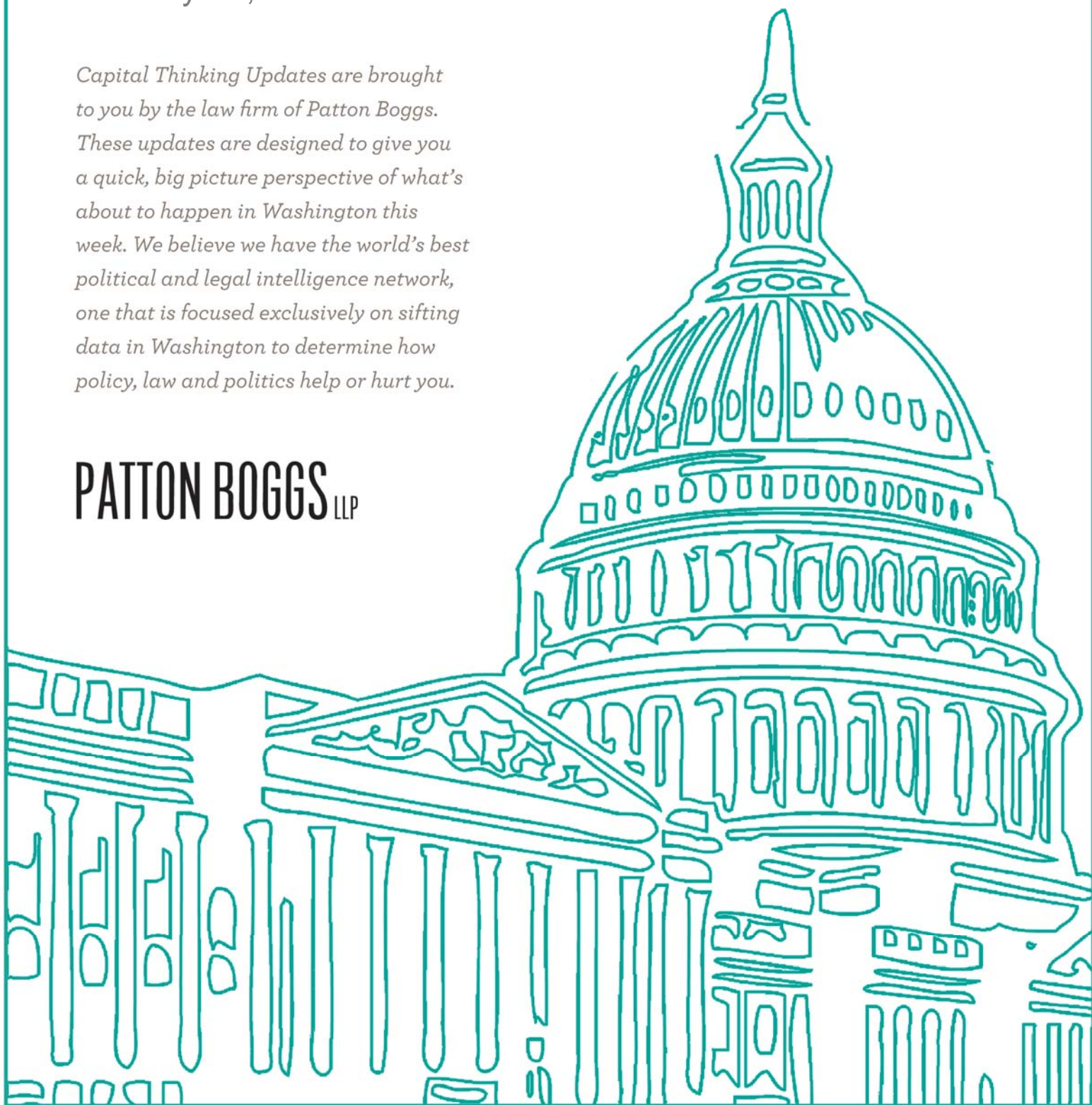


CAPITAL **thinking** UPDATES

January 23, 2012

Capital Thinking Updates are brought to you by the law firm of Patton Boggs. These updates are designed to give you a quick, big picture perspective of what's about to happen in Washington this week. We believe we have the world's best political and legal intelligence network, one that is focused exclusively on sifting data in Washington to determine how policy, law and politics help or hurt you.

PATTON BOGGS LLP



General Legislative

On Monday, January 23, 2012, the House will meet at 12:00 p.m. for morning hour and at 2:00 p.m. for legislative business. The following bills will be considered under suspension of the rules: the “Rota Cultural and Natural Resources Study Act” (H.R. 1141), and the “Permanent Electronic Duck Stamp Act of 2011” (H.R. 3117). The Senate will convene at 2:00 p.m. for a period of morning business. At 4:00 p.m., the Senate will proceed to executive session to consider the nomination of John M. Gerrard to be United States District Judge for the District of Nebraska.

Budget, Appropriations

LEGISLATIVE ACTIVITY

- **FY2012 Appropriations.** On December 23, 2011, President Obama signed the Consolidated Appropriations Act, 2012 (“omnibus” / “megabus” / H.R. 2055 / S. 3671 / P.L. 112-74), completing the FY2012 budget process. The federal government had been operating under a series of Continuing Resolutions (CRs) since the start of the 2012 fiscal year on October 1, 2011 (P.L. 112-33; P.L. 112-36; P.L. 112-55; H.J. Res. 94; H.J. Res. 95).
- The omnibus package included nine spending bills: Defense, Energy and Water, Financial Services, Homeland Security, Interior-Environment, Labor-HHS-Education, Legislative Branch, Military Construction-Veterans Affairs, and State-Foreign Operations. The other three bills - Agriculture, Commerce-Justice-Science, and Transportation-Housing – were included in the Consolidated and Further Continuing Appropriations Act, 2012, enacted on November 18 (“minibus” / H.R. 2112 / P.L. 112-55).
- Discretionary spending levels for FY2012 adhere to the overall cap of \$1.043 trillion, which was established in the Budget Control Act of 2011 (P.L. 112-25). This cap is slightly lower than the FY2011 discretionary spending level of \$1.05 trillion, but higher than the \$1.019 trillion cap proposed in the House FY2012 Budget Resolution (H. Con. Res. 34).
- Also on December 23, the President signed a separate bill which provided \$8.12 billion in disaster-related aid - \$6.4 billion to the Federal Emergency Management Agency’s (FEMA) Disaster Relief Fund (in addition to the \$700 million provided in the FY2012 Omnibus) and \$1.7 billion for the Army Corps of Engineers (H.R. 3672 / P.L. 112-77). The allocation of the Army Corps funding included \$802 million to the Mississippi River account to address disaster-related damages, \$534 million for operations and maintenance to address dredging of navigation channels and disaster-related damages, and \$388 million for flood control and coastal emergencies.
- **FY2013 Budget.** President Obama is currently scheduled to release his FY2013 Budget Proposal on February 7. As previously reported, the Office of Management and Budget (OMB) directed all federal departments and agencies to submit budget requests that are five percent below FY2011 discretionary levels and to identify additional reductions that would lower the requests to 10 percent below FY2011 discretionary levels. The guidance also noted these reductions should not include across-the-board reductions, decreases to mandatory spending, reclassification of existing discretionary funding, or enactment of user fees. The

President will provide a preview of the Administration's FY2013 funding priorities in his January 24 State of the Union Address.

- **Debt Ceiling Increase / Resolution of Disapproval.** On January 12, President Obama requested the third installment of borrowing authority as provided in the Budget Control Act of 2011 (P.L. 112-25). The President's request of a \$1.2 trillion debt ceiling increase is deemed sufficient to cover the government's borrowing needs until just after the November elections, setting up another potential debt limit debate just as the Bush-era tax cuts are set to expire and just before automatic spending cuts required by the Budget Control Act (sequestration) are set to take effect.

The Budget Control Act also provides each chamber an opportunity to hold a vote on a resolution of disapproval to block the President from accessing the requested installment of borrowing authority. The House passed its resolution of disapproval (H.J. Res. 98) concerning the President's most recent request in a 239-176 vote on January 18. The Senate is scheduled to vote on (and will reject) a similar measure this week. Without passage in both chambers, the resolution will die and the President's request to raise the debt ceiling will move forward. In general, the vote is largely symbolic and the resolution serves only to provide Republicans a means to express their objections to increasing the nation's debt limit.

Education

LEGISLATIVE ACTIVITY

- **Roundtable on For-Profit Schools.** On Monday, January 23, Senator Richard Durbin (D-IL), will host a forum in Chicago, Illinois to examine the recruiting and marketing practices for-profit schools employ in targeting servicemembers and veteran students. Holly Petraeus, Assistant Director of Servicemember Affairs at the Consumer Financial Protection Agency, will also attend.
- **Piracy Bills.** On Friday, January 20, Senate Majority Leader Harry Reid (D-NV) and House Judiciary Committee Chairman Lamar Smith (R-TX) separately announced that they will postpone consideration of anti-piracy legislation—Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property (PROTECT IP) Act of 2011 (PIPA) (S. 968) and the Stop Online Piracy Act (SOPA) (H.R. 3261), respectively. If enacted, the bills would allow the U.S. Department of Justice to seek court orders against the registrant or owner of website, including universities and colleges, accused of copyright infringement.

This decision follows numerous calls from Members of Congress to reevaluate key provisions of the bills after thousands of web sites, including Wikipedia and Google, protested the bills on Wednesday, January 18. Lawmakers, including Senate Minority Leader Mitch McConnell (R-KY), Senators Orrin Hatch (R-OR), Roy Blunt (R-MO), John Boozman (R-AR), and Marco Rubio (R-FL), called for Congress to work towards an agreement that would avoid unnecessarily penalizing end-users. On Saturday, January 14, the White House also voiced concerns regarding key provisions of the piracy bills.

In October 2011, Representative Lamar Smith introduced SOPA, which is still at the committee level. In May 2011, Senator Patrick Leahy (D-VT) introduced PIPA, which was reported out of the Judiciary Committee in June 2011 and scheduled for a vote to invoke cloture on a motion to proceed on Tuesday, January 24.

- **In Case You Missed It – ESEA Reauthorization.** During the Congressional recess, the Chairman of the House Education and Workforce Committee, John Kline (R-MN), introduced two draft bills designed to rewrite the Elementary and Secondary Education Act (ESEA), currently known as No Child Left Behind. The “Student

Success Act” and the “Encouraging Innovation and Effective Teachers Act” would replace the school accountability system of the current law and establish teacher effectiveness measures, respectively. The House Committee plans to mark up the two draft bills in the next couple of months.

In introducing the draft bills, Chairman Kline remarked that he had abandoned bipartisan talks during the Committee’s reauthorization of ESEA because such negotiations were impeding the reauthorization process. Chairman Kline’s approach raises concerns among Democrats about the likelihood of the House passing a comprehensive ESEA bill. Democrats believe that only a bipartisan bill can pass and be signed by the President by year’s end.

REGULATORY ACTIVITY

- **Town Hall on College Affordability and Reforms to the Educational System.** On Friday, January 20, Secretary Arne Duncan traveled to the Minneapolis area to host two town hall meetings. The first focused on college affordability and the Free Application for Federal Student Aid (FASFSFA), and the second focused on reforms to create a cradle to college and career education system. Senators Amy Klobuchar (D-MN) and Al Franken (D-MN) joined Secretary Duncan at South High School during the first town hall.

The town halls are part of a continuing college affordability dialogue with Vice President Joe Biden and Secretary Duncan. During the week of January 15, Vice President Biden visited high schools in Ohio, Pennsylvania, and Nevada.

- **Americans with Disabilities Act and Rehabilitation Act.** On Thursday, January 19, the Department of Education’s Office for Civil Rights issued a Dear Colleague letter regarding the Americans with Disabilities Act (ADA) Amendments Act. The letter provides additional guidance on the requirements of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act in elementary and secondary schools. The letter and Frequently Asked Questions discuss obligations of school districts, such as the requirement to evaluate students for disability.

Effective January 1, 2009, the Amendments Act amended the ADA and Rehabilitation Act. According to the Department, the intent of the Amendments Act was to broaden the definition of “disability” to refocus inquiries on the actions and obligations of school districts to ensure equal educational opportunities, instead of focusing on whether a student has a disability as defined by the ADA and Section 504.

- **Negotiated Rulemaking for Title IV Regulations.** On Wednesday, January 18, the Department of Education published Frequently Asked Questions about the negotiated rulemaking process for Title IV Regulations. On December 22, 2011, the Department released its list of members who would serve on the negotiating panel for the proposed rules regulating Title IV student loan programs. The panel will consider issues such as loan repayment levels based on borrowers’ income. Of the 14 primary slots, the Department assigned three slots to student/consumer groups and a fourth to the consumer protection chief for the states attorney general (from Kentucky) who is leading the national charge against potential financial aid abuse by for-profit colleges. The Department selected two representatives from for-profit colleges.

On October 21, 2011, the Department published a notice in the Federal Register announcing its intent to establish a negotiated rulemaking committee to prepare proposed regulations related to Title IV student loan programs.

Energy

LEGISLATIVE ACTIVITY

- **House Legislation.** House Speaker John Boehner (R-OH) is expected to bring the American Energy and Infrastructure Jobs Act (H.R. 7) up for a floor vote in coming weeks. That bill would expand domestic energy production to help fund high-priority infrastructure projects. It is not expected to garner enough support by Democrats in the Senate to reach the President's desk.
- **Keystone XL Pipeline.** On Wednesday, January 18, acting through the State Department, the Administration formally denied TransCanada's application to build the Keystone XL pipeline using the route initially proposed (and thus well ahead of the February 21 deadline set by Congress for a decision). President Obama issued a statement explaining that, "the rushed and arbitrary deadline insisted on by Congressional Republicans prevented a full assessment of the pipeline's impact, especially the health and safety of the American people, as well as our environment." Taking into account the work underway to find a new route for the pipeline through Nebraska, the State Department pointed out that "the permit application does not preclude any subsequent permit application or applications for similar projects." House Republicans are expected to continue pressuring the Administration to approve the project. We expect renewed Republican-led efforts to expedite project approval as part of the longer-term "payroll tax" extension debate or through separate legislation to possibly shift the decision from the State Department to another federal agency or Congress itself, though such bills are unlikely to become law.
- **Congressional Hearings.** A House Science, Space, and Technology subcommittee will hold an oversight hearing on the ARPA-E program on Tuesday, January 17. A House Energy and Commerce subcommittee will hold another hearing on Wednesday, January 18 regarding the Keystone XL legislation (H.R. 3548) sponsored by Representative Lee Terry (R-NE); Chairman Fred Upton (R-MI) has reportedly invited Secretary of State Hillary Clinton to testify on the Administration's decision to reject the permit application last week.

REGULATORY ACTIVITY

- **LNG Exports.** The Energy Information Administration (EIA) has released a report on the effects that increased natural gas exports would have on the economy: higher domestic natural gas prices, increased domestic natural gas production, increased natural gas imports from Canada, and reduced domestic natural gas consumption. EIA estimates that consumer natural gas and electricity bills would increase 3-9 percent and 1-3 percent, respectively, with increased exports from 2015 to 2035.
- **Onshore Royalty Rates.** The Interior Department is expected to propose increasing the royalty rate for onshore oil and gas leases on federal lands. That rate currently stands at 12.5 percent.
- **Hydraulic Fracturing.** The Interior Department is also expected to propose a rule in coming weeks that would require the disclosure of fluids used in hydraulic fracturing activities on public lands. Separately, the Office of Management and Budget is reportedly reviewing a proposal from the Environmental Protection Agency that would adopt an expansive definition of "diesel" when diesel fluids are used in hydraulic fracturing operations.
- **Central Gulf of Mexico Lease Sale.** The Bureau of Ocean Energy Management has released a Final Supplemental Environmental Impact Statement for proposed oil and gas lease sale 216/222.

National Petroleum Council. The Department of Energy has renewed the Council for a two-year period, beginning Thursday, January 12 to advise and provide recommendations to the Secretary on oil and natural gas matters.

Environment

LEGISLATIVE ACTIVITY

- **Ground Water.** On Wednesday, February 1, the House Committee on Science, Space and Technology, Subcommittee on Energy and Environment will hold a hearing concerning U.S. Environmental Protection Agency (EPA) hydraulic fracturing research. The hearing will focus on the EPA's approach to ground water research.

REGULATORY ACTIVITY

- **National Environmental Justice Advisory Council Nominations.** The EPA is soliciting nominations of qualified candidates for appointment to its National Environmental Justice Advisory Council (NEJAC). The NEJAC was chartered to provide advice regarding broad crosscutting issues related to environmental justice. The EPA is soliciting nominations for eight new vacancies through June 15, 2015. Nominees will be selected to represent academia (one vacancy), business and industry (two vacancies), grassroots community-based organizations (one vacancy), non-governmental/environmental organizations (one vacancy); state and local government agencies (two vacancies); and tribal governments (one vacancy). Nominations should be submitted by January 25.
- **Municipal Stormwater.** The EPA is holding a series of workshops to gather views of stakeholders on the use of integrated municipal stormwater and wastewater plans to meet the water quality objectives of the Clean Water Act. The workshops are intended to assist the EPA in developing an integrated planning approach framework to help municipalities prioritize infrastructure investments to maximize water quality benefits and consider various innovative approaches, such as sustainable green infrastructure. The workshops will include a facilitated discussion with representatives of organizations that represent elected local officials, publicly owned treatment works (POTW), municipal stormwater managers, state National Pollutant Discharge Elimination System (NPDES) permitting and enforcement authorities, and environmental advocacy groups. The EPA invites other interested members of the public to observe the workshops and to offer verbal comments and solicits statements and input from the interested public on or before February 29. The dates for the workshops are:
 - January 31, 2012, 10:00 a.m. to 3:00 p.m. at EPA Region 4 Office, 61 Forsyth Street, SW, Atlanta, GA 30303
 - February 6, 2012, 10:00 a.m. to 3:00 p.m. at EPA Region 2 Office, 290 Broadway, New York, NY 10007-1866
 - February 13, 2012, 10:00 a.m. to 3:00 p.m. at EPA Region 10 Office, 1200 Sixth Avenue, Seattle, WA 98101
 - February 15, 2012, 10:00 a.m. to 3:00 p.m. at EPA Region 7 Office, 901 N. 5th Street Kansas City, KS 66101

- February 17, 2012, 10:00 a.m. to 3:00 p.m. at EPA Region 5 Office, 77 West Jackson Boulevard, Chicago, IL 60604-3507.
- **2012 Renewable Fuel Standards.** The EPA announced its final rule for the regulation of fuel and fuel additives for 2012. Entities affected by this rule are those involved with the production, distribution and sale of transportation fuels including gasoline and diesel fuel or renewable fuels such as ethanol and biodiesel. Under the Clean Air Act, the EPA is required to set the renewable fuel standards for the following year. The EPA finalized a projected cellulosic biofuel volume for 2012 and annual percentage standards for that fuel as well as for biomass-based diesel, advanced biofuel and renewable fuels that will apply to all gasoline and diesel produced or imported for domestic use in 2012.
- **Chemical Manufacturing.** EPA announced a proposed rule to amend air toxics standards for industrial source categories in the chemical manufacturing industry. Section 112 of the Clean Air Act establishes a regulatory process to address emissions of hazardous air pollutants from stationary sources. The EPA is proposing amendments to three National Emission Standards for Hazardous Air Pollutants (NESHAP): for Group IV polymers and resins, for pesticide active ingredient production, and for polyether polyols production. For all three of these NESHAP rules, the EPA is proposing decisions concerning residual risk reviews; technology reviews; emissions during periods of startup, shutdown and malfunction; standards for previously unregulated hazardous air pollutant emissions; and electronic reporting of performance test results. Comments must be received on or before March 9.

Financial Services

LEGISLATIVE ACTIVITY

- **House Oversight Committee to Discuss Recess Appointment of Richard Cordray to Consumer Financial Protection Bureau.** On Tuesday, January 24, the House Oversight and Government Reform Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs will hold a hearing titled "How Will the CFPB Function Under Richard Cordray?"
- **House Agriculture Committee to Consider OTC Derivatives Legislative Proposals.** On Wednesday, January 25, the House Agriculture Committee will meet to markup several legislative proposals related to over-the-counter derivatives markets, including (i) a bill to improve consideration by the Commodity Futures Trading Commission of the costs and benefits of its regulations and orders (H.R. 1840), (ii) the Business Mitigation and Price Stabilization Act of 2011 (H.R. 2682), (iii) a bill to exempt inter-affiliate swaps from certain regulatory requirements put in place by the Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 2779), (iv) the Swap Execution Facility (SEF) Clarification Act (H.R. 2586), (v) the Small Business Credit Availability Act (H.R. 3336), and (v) Protecting Main Street End-Users from Excessive Regulation (H.R. 3527).

REGULATORY ACTIVITY

- **SEC Advisory Committee on Small and Emerging Companies to Meet.** On Wednesday, February 1, the Securities and Exchange Commission's Advisory Committee on Small and Emerging Companies will hold a public meeting to consider recommendations and other matters relating to rules and regulations affecting small and emerging companies under the federal securities laws.

Health Care

LEGISLATIVE ACTIVITY

- **Doc Fix/Health Extenders.** With the Senate's return to session on January 23, both Chambers turn their attention to the Extension Bill conference and will begin formal conference committee negotiations in a meeting on Tuesday. Proposed offsets remain at issue, and the new Congressional Budget Office (CBO) baseline anticipated on January 31 is expected to increase the cost of the physician fee fix as well as reduce potential savings from troop withdrawal. The current extension runs through February, and while many Members prefer an extension to carry through the end of the year, a short-term patch is a strong possibility should offset discussions remain controversial.
- **Energy and Commerce Hearing.** On Wednesday, February 1, the House Energy and Commerce Health Subcommittee will hold a hearing on the reauthorization of the Prescription Drug User Fee Act, which expires on September 30, 2012. Under the user fee authority, FDA collects funds from industry to help expedite the human drug approval process. To date, Dr. Margaret Hamburg, Commission of the Food and Drug Administration will testify, with additional witnesses to be announced.
- **House VA Hearing.** On Wednesday, February 1, the House Committee on Veterans' Affairs will hold a hearing titled "Examining VA's Pharmaceutical Prime Vendor Contract."
- **Energy and Commerce Hearing.** On Tuesday February 7, the House Energy and Commerce Health Subcommittee will hold a hearing on the new Generic Drug User Fee proposal and Biosimilar User Fee proposal, which will bring additional funds to FDA to help alleviate the backlog of generic drug applications. Members will also continue to discuss the ongoing issue of drug shortages. Dr. Janet Woodcock, Director of the Center for Drug Evaluation and Research, FDA, is scheduled to testify, with additional witnesses to be announced.

Energy and Commerce Hearing. On Wednesday, February 15, the House Energy and Commerce Health Subcommittee will hold a hearing on the reauthorization of the Medical Device User Fee Act, which expires on September 30, 2012. These user fees fund FDA's premarket device applications. Dr. Jeffrey Shuren, Director, Center for Devices and Radiological Health of the Food and Drug Administration will testify.

International, Defense, Homeland Security

- **Proposed Trade Reorganization.** On Friday, January 13, President Obama proposed to merge into the Department of Commerce the Office of the U.S. Trade Representative (USTR), the Export-Import Bank, the Overseas Private Investment Corporation, the Trade and Development Agency, and the Small Business Administration, while moving the National Oceanic and Atmospheric Administration from Commerce to the Department of Interior. The Administration also plans to submit legislation to Congress that would provide enhanced "fast-track" authority to enable current and future occupants of the White House to submit such reorganizations to Congress only for an up-or-down vote, with no amendments.

Reaction on Capitol Hill to the proposed Commerce reorganization has been mixed, while the private-sector parts of the U.S. international trade community have been largely critical. Senate Homeland Security and

Governmental Affairs Committee (SHSGAC) Chairman Joe Lieberman (I-CT) and House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA), whose committees have primary jurisdiction over the issue, have voiced a desire to work with President Obama on the Commerce proposal, citing the need to maximize government efficiency and budgetary savings, although Congressman Issa has sounded less enthused about the Administration's "fast-track" component. SHSGAC Ranking Member Susan Collins (R-ME) and Senate Minority Leader Mitch McConnell (R-KY) also have promised to keep an open mind on the President's proposal. On the other hand, Senate Finance Committee Chairman Max Baucus (D-MT) and House Ways and Means Committee Chairman Dave Camp (R-MI), whose committees oversee USTR, have jointly criticized the idea of folding the small, focused trade agency into the large, multi-faceted Department of Commerce. Former Bush and Clinton Administration trade officials also have questioned the desirability of blending the roles of the trade agreement-negotiating USTR and the trade agreement-enforcing Commerce Department. Even though the Obama Administration has promised to maintain the Cabinet rank of the U.S. Trade Representative, some former officials also have pointed to the increased diplomatic heft that serving as the head of an agency has brought to Ron Kirk and his predecessors at USTR.

In the end, the President may gain some traction on Capitol Hill this year with the substance of his proposal to merge several agencies, as Congress looks for ways to show progress on government reform issues in an election year. However, those same election year pressures are likely to spur significant Republican resistance to the "fast-track" aspect of President Obama's proposal.

- **Iran-Israel Developments.** The combined effects of U.S. diplomatic efforts with Israel, and U.S. and multilateral sanctions on Iran have seemed to cool Israeli discussions of a preemptive strike against Iran's nuclear program. On Wednesday, January 18, Israeli Defense Minister Ehud Barak, a longtime hawk on Iran issues in contrast to his relative dovishness on Israeli-Palestinian matters, stated that an Israeli decision on attacking Iran is "very far off."

Nevertheless, the Chairman of the U.S. Joint Chiefs of Staff, General Martin Dempsey, is meeting in Israel late this week with Barak, Prime Minister Benjamin Netanyahu, and President Shimon Peres to reiterate the U.S. desire for continued coordination with Israel on Iran and, no matter who was responsible for the recent car bomb that killed Iranian nuclear scientist Mostafa Ahmadi Roshan, to stress the need for some degree of patience with the sanctions regime against Tehran. General Dempsey surely will cite President Obama's view that sanctions already have left Iran's economy "in a shambles." Japan's recently announced reduction of Iranian oil imports, and the European Union's new sanctions, are also aimed at further curtailing the financial reach of Iran's central bank. Of course, any Iranian attempt to close the Strait of Hormuz, which both the U.S. and Israeli governments still appear to view as unlikely, would immediately change the equation and the message from both governments.

Tax

LEGISLATIVE ACTIVITY

- **House and Senate to Conference on Payroll Tax/Unemployment Insurance/Doc Fix Legislation.** Before recessing for the holidays, Congress passed a fully-offset two-month extension of three provisions: payroll tax, unemployment insurance, and the Medicare physicians payment fix – or the so-called "doc fix." The legislation was offset by an increase in fees charged by Fannie Mae and Freddie Mac to lenders. The legislation also included a provision forcing the Administration to make a decision on the Keystone XL

Pipeline within 60 days. (As discussed above, last week, the President rejected, for the time being, the pipeline proposal, arguing that the 60 day deadline left too little time for State Department review of the project.) As part of the two-month deal, the House and Senate agreed to conference on House-passed legislation that would extend all three provisions through the end of 2012 at an approximate cost of \$150 billion for a 10-month extension. The conference committee will hold its first meeting to resolve differences between the House and Senate bills on January 24.

While there has been strong partisan divide on this issue, most Congressional Republicans acknowledge the need to come to agreement on a final bill prior to the end of February, when the current two-month extension expires. The major issues in controversy will involve how (and if) to pay for the cost of the legislation. House and Senate Republicans have insisted the legislation be fully offset with spending cuts, while Senate Democrats, and the President, do not necessarily agree that the legislation needs to be offset, arguing that it should be financed by a combination of tax and fee increases.

While the conference committee could decide to address additional issues, there will be pressure not to exceed the scope of the House and Senate bills being conferenced. Although not likely, additional tax provisions (such as the just-expired 2011 tax “extenders,” including the R&D tax credit and the Active Financing Exception) could be included in a final conference report. However, should the conferees determine to pay for the bill, which seems likely, the addition of items, such as “extenders” (costing approximately \$30 billion), will make it considerably more difficult to offset the legislation.

- **Tax Reform Hearings Next Week.** The following hearing is scheduled next week in the House Ways and Means and Senate Finance Committees:

January 24: House Ways and Means Social Security Subcommittee hearing, titled “Securing the Future of the Social Security Disability Insurance Program.”

REGULATORY ACTIVITY

- **IRS Signals End of Month Release of FATCA Proposed Rules.** On January 19, an IRS official indicated that proposed regulations under the Foreign Account Tax Compliance Act (FATCA) should be issued by the end of the month. Enacted in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act, the law imposes broad requirements on foreign financial institutions to report U.S.-owned accounts to the IRS. The IRS already has issued two major pieces of guidance under the statute: Notice 2011-34 and Notice 2011-53.

TechComm

LEGISLATIVE ACTIVITY

- **Stop Online Piracy Act/PROTECT IP Act.** As Congress adjourned for 2011, the Stop Online Piracy Act (SOPA, H.R. 3261) and PROTECT IP Act (PIPA, S. 968), seemed to be on a steady track to passage despite slowly growing opposition to both bills. That opposition has been led by Senate Commerce Committee member Ron Wyden (D-OR) and House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA), who on December 8 released a draft of the Online Protection and Enforcement of Digital Trade (OPEN) Act, their alternative piracy protection legislation. The legislation was accompanied by www.KeepTheWebOPEN.com, a website designed to serve as a portal for those interested in offering ideas and comments as Congress works toward a final bill. The 2011 session ended with PIPA having been teed up

for Senate floor action in January and the House Judiciary Committee in the middle of marking up SOPA. But, the 2012 session is starting with support for the proposals eroding in both the House and Senate, and much murkier outlook for passage.

Both PIPA and SOPA aim to protect American intellectual property (IP) from overseas online pirates by giving the Attorney General authority to seek injunctions against foreign websites that steal and sell American “innovations” and products. The bills also increase criminal penalties for individuals who traffic in counterfeit medicine and military goods, and seek improved coordination between U.S. IP enforcement agencies. At issue with both bills, however, are three main concerns: 1) should search engines, like Google, be included in the bill’s provisions that would require them to prohibit search links to suspected “rogue” websites; 2) can content owners ask the court to force other Internet providers to stop doing business with “rogue” websites; and 3) who should have enforcement responsibility – the Department of Justice or the International Trade Commission.

The growing opposition, and resulting questionable status of the legislation, came to a head on January 18, when a number of Internet companies – most notably, Google, Wikipedia, and Mozilla, among others – staged a 24 hour “black out” to bring attention to the technology industry’s position that the bills as currently written could put search engines and other sites out of business and “shut down the Internet.” Companies also made it easy for website visitors to contact Members of Congress directly to voice their opposition to the pending legislation. By the end of the day, a host of House and Senate co-sponsors of SOPA/PIPA had removed their support, including former Senate Judiciary Committee Chairman Orrin Hatch (R-UT), himself a long-time supporter of intellectual property rights and friend to the content industry, and Senators Roy Blunt (R-MO), John Boozman (R-AK), and Marco Rubio (R-FL). At the same time, both Senate Judiciary Committee Ranking Member Charles Grassley (R-IA) and Senate Republican Campaign Committee Chairman John Cornyn (R-TX) withdrew support for PIPA’s progress in the Senate as currently written. In the House, a number of former supporters/co-sponsors also pulled their support including Representatives Joe Walsh (R-IL), Lee Terry (R-NE), and House Budget Committee Chairman Paul Ryan (R-WI). Even the White House has taken a slight step back, saying “While we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet. Moving forward, we will continue to work with Congress on a bipartisan basis on legislation that provides new tools needed in the global fight against piracy and counterfeiting, while vigorously defending an open Internet based on the values of free expression, privacy, security and innovation.”

With the onslaught of opposition in full effect, Senate Majority Leader Reid has cancelled a procedural vote on S. 968 that was scheduled for January 24. This vote was to serve as the first test of the Senate’s ability to move these two bills early this year. Now, it is unclear when, and if, the vote will be rescheduled or if modifications can be made to appease both sides.

House Oversight Committee Chairman Darrell Issa (R-CA) has indicated his desire to hold a hearing on SOPA but a date has not yet been set. House Judiciary Committee Chairman Lamar Smith (R-TX), on the other hand, continues to push for a continuation of the in-progress SOPA mark-up, which is also yet to be scheduled.

- **Spectrum.** As 2011 came to a close, Congress appeared poised to include spectrum legislation in a long-term plan to extend the payroll tax holiday and unemployment insurance and increase Medicare doctors’ payments. When lawmakers reached a stalemate, Congress instead adopted a short-term fix through the end

of February 2012 that did not include spectrum reform and that set the stage this year for a House-Senate Conference Committee to find ways to pay for those measures for the balance of the year. Spectrum incentive auctions will be among the “pay-fors” House and Senate conferees consider this week as they begin to broker a long-term agreement before the short-term extensions expire in February.

To that end, several House telecom leaders have been named to serve on the House-Senate Conference Committee: House Energy and Commerce Committee Chairman Fred Upton (R-MI), Communications and Technology Subcommittee Chairman Greg Walden (R-OR), and Representative Henry Waxman (D-CA), Ranking Member of the full Committee, who crafted the Jumpstarting Opportunity Through Broadband Spectrum (JOBS) Act. Meanwhile, Waxman has offered a Democratic alternative, H.R. 3509, the Wireless Innovation and Public Safety Act of 2011, that differs from the JOBS Act in several areas, most notably on public safety network governance.

In the Senate, neither Commerce Committee Chairman Jay Rockefeller (D-WV), nor Communications, Technology and the Internet Subcommittee Chairman John Kerry (D-MA), both champions of S. 911, the Public Safety Spectrum and Wireless Innovation Act that passed Rockefeller’s panel in June 2011, were named as conferees. Despite their absence, Senate conferees will be negotiating for S. 911’s provisions to prevail in conference, although House conferees will defer to Upton and Walden on spectrum-related issues.

There are key differences between the House and Senate approaches to spectrum. For example, public safety and municipal groups have been critical of the JOBS Act because it contains several controversial provisions, including a proposal to return to the Federal Communications Commission (FCC) public safety “narrowband” spectrum that first responders now use for voice communications. Under that JOBS Act, public safety would have to return 14 megahertz of 700 MHz spectrum for reassignment for commercial use through a future auction. Public safety would have to return this spectrum five years after a private Administrator certifies the “availability of standards for public safety voice over broadband.” According to public safety officials and state and local governments, more than 11,000 state and local public safety licensees would be directly impacted, especially in major metropolitan areas where public safety spectrum is already congested. Further, they point to the significant state and local financial investments that would be put at risk by this requirement. No similar provision exists in S. 911.

- **Cybersecurity.** While work continues in the Senate on a comprehensive cybersecurity bill, an aide to Senate Majority Leader Harry Reid, (D-NV), said this week at the annual State of the Net Conference, that the Senate is on track to meet Reid’s goal of bringing the legislation to the floor in the next three to four weeks.

“What comes to the floor will reflect wide agreement,” said Tommy Ross, Reid’s senior intelligence and defense adviser. If and when the Senate acts on the bill, it is unclear what will happen in the House, where Republican leaders have crafted separate cybersecurity bills among nine committees.

Industry and government officials, including the White House, have called for legislation to address the growing threat of cyber attacks. Among the proposals being considered are measures to clarify and increase the authority of agencies like the Homeland Security Department to handle cyber threats, protect non-governmental networks that may affect national or economic security, and increase penalties for cyber crimes.

REGULATORY ACTIVITY

FCC Open Meeting. On January 31, the FCC will hold its monthly open business meeting, at which the Agency will consider the Report and Order and Further Notice of Proposed Rulemaking to comprehensively reform the Lifeline program. Key considerations include ensuring universal availability of communications services to low-income Americans, while minimizing the universal service contribution burden. This will be accomplished by eliminating waste, fraud and abuse; strengthening program oversight and administration; and modernizing Lifeline to support broadband adoption.

Transportation

LEGISLATIVE ACTIVITY

- **FAA Reauthorization.** The current extension of FAA authorization is set to expire on January 31. House and Senate leadership have stated their commitment to passing a long-term reauthorization of the FAA bill and committee staff remains optimistic that an agreement over the bill's provisions could occur by the January 31 deadline. However, a number of issues—including National Mediation Board rules on airline worker unionization, slots at Washington Reagan National Airport, funding levels for FAA programs and Essential Air Service and the carriage of lithium batteries aboard aircraft—remain under discussion. With the Senate returning from recess on January 23, lawmakers are left with a short window to draft a bill and secure passage in both chambers before the expiration deadline, thus, possibly requiring another short-term extension.
- **SAFETEA-LU Reauthorization.** The reauthorization of the multi-year highway and transit reauthorization bill, SAFETEA-LU, will be a focal point as Congress returns from recess, and there will be a strong push to enact a multi-year reauthorization over the next few months. SAFETEA-LU has been extended eight times, with the current extension expiring on March 31. Chairman John Mica (R-FL) of the House Transportation and Infrastructure (T&I) Committee, plans to focus on the immediate issue of FAA reauthorization before moving onto the surface transportation bill. Mica's committee and the Senate Banking Committee, however, are expected to release and markup their respective drafts in the next few weeks, with the Senate Banking Committee expected to move either next week or the following week and the House T&I Committee possibly marking up their surface bill on February 3. However, the fundamental questions of how to pay for the legislation and what its duration should be – with the House preparing to move forward with a five year bill funded in significant part through new revenues from domestic energy production, and the Senate moving forward with a two year bill requiring \$12-\$13 billion in as-of-yet-undetermined offsets – remain unresolved. Given the complexities involved, it may be difficult for Congress to reach any agreement by the March 31 deadline, requiring at least another short-term extension of surface transportation programs.