

# Washington Insight



We are pleased to present this issue of *Washington Insight*, a bi-weekly newsletter containing information about emerging issues of importance in the Administration, the Executive Branch and Congress. If you have any questions or would like additional information, please feel free to contact the King & Spalding practitioner who is identified in the item of interest. We also welcome your comments and suggestions for future editions - you can contact me at [tspulak@kslaw.com](mailto:tspulak@kslaw.com) or + 1 202 661 7948.

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## [Granting Pardons - An Insider's View](#)

*Robert L. Ehrlich*

Governor Haley Barbour's recent troubles should not dampen public interest and support for an aggressive pardons and commutations process. Indeed, governors and presidents do well to explore a more proactive approach to criminal justice reform, as the harsh consequences of 1980s era sentencing policies come home to roost.

In a similar vein, state legislators from around the country (and from both sides of the aisle) are revisiting the wisdom of mandatory minimums and sentencing guidelines. What sounded so good a few years ago has led to an explosion of non-violent offenders serving lengthy sentences. We now lead the world in placing people behind bars, at an annual price tag of over \$60 billion dollars. Today, recession driven fiscal concerns and substantive questions about fairness make criminal justice issues a higher priority for all policy makers.

Two caveats to keep in mind, however.

(1.) An active pardons and commutations process does not necessarily translate into good politics. Detractors from the right and a lack of appreciation from the left may leave senior advisors wondering if it was all worthwhile. Communications failures about the process and procedures of post conviction relief only make matters worse, as evidenced by the media frenzy accompanying the Mississippi pardons.

(2.) Nobody said leadership in practice is easy. But strong executives understand this extraordinary process can serve the interests of justice. And what better job description for a governor or president?

## Senator Snowe's Decision to Leave the Senate - What Does it Mean?

*Lloyd N. Hand, William Clarkson*

Last Tuesday, U.S. Senator Olympia Snowe (R-ME) announced that she will not be seeking a third term. While other Senate moderates, such as Joe Lieberman (I-CT), Kent Conrad (D-ND) and Ben Nelson (D-NE), have also chosen not to run for re-election this year, Snowe's sudden announcement was greeted with equal shock in Maine and Washington. Although Snowe has received much criticism from Tea Party-influenced state Republican party leaders, it was widely believed that she would easily fend off a primary challenge and run virtually unopposed in the statewide election. While Maine has two Republican Senators and a Republican Governor, President Obama won the state convincingly in the 2008 Presidential Election and is expected to do the same this year. Therefore, the potential loss of a safe seat in a blue state could be a huge blow to Republican efforts to reclaim the majority in the Senate.

In explaining her decision to step down, Senator Snowe stated, "I do not believe that, in the near term, the Senate can correct itself from within. It is by nature a political entity and, therefore, there must be a benefit to working across the aisle." Her prediction might prove to be correct, especially since Snowe and her retiring colleagues might not be replaced by fellow party moderates. In Maine, Rep. Pingree, a liberal Democrat, could face Tea Party-affiliated candidate Scott D'Amboise. In Nebraska, former Senator Bob Kerrey's decision to run for outgoing Senator Ben Nelson's seat has further boosted Democrats' hopes for keeping their Senate majority. However, Kerrey's entry into the race has been lambasted by liberal Democrats, including Daily Kos founder Marcos Moulitsas, who was recently quoted in Politico as saying, "Bob Kerrey equals Joe Lieberman in our minds. I can pretty much guarantee that Kerrey won't get any significant small dollar money outside of Nebraska." Regardless of who replaces Snowe, Lieberman, Nelson and Conrad, there is no doubt that their departure will make it even more difficult to reach consensus on significant legislation in the Senate.

## Reauthorization of Device User Fee Programs Moving Forward

*Daniel F. Donovan*

Congress continues to make progress on reauthorization of the Medical Device User Fee Act (MDUFA) and the Prescription Drug User Fee Act (PDUFA) programs set to expire in September. After reaching an agreement "in principle" one month ago, FDA and the medical device industry agreed last week to a draft commitment letter and proposed legislative language to reauthorize device-related FDA user fees. The medical device industry agreed to more than double the user fees paid under the current five-year MDUFA program. Following review by HHS and OMB, the commitment letter and legislative language must be published in the Federal Register for public comment before being sent to Congress.

Congress takes another small step toward PDUFA reauthorization on Thursday of this week when the House Energy and Commerce Health Subcommittee will hold a hearing entitled "FDA User Fees 2012: Hearing on Issues Related to Accelerated Approval, Medical Gas, Antibiotic Development and Downstream Pharmaceutical Supply Chain." Dr. Janet Woodcock, Director of the FDA Center for Drug Evaluation and Research, will testify along with a number of industry representatives.

## The President's Proposal to Reduce Corporate Taxes

*Thomas J. Spulak, Claudia A. Hrvatin*

On Wednesday, February 22<sup>nd</sup>, the President announced his framework for a reduction in the corporate tax rate. Indicating that the current corporate tax system is “outdated, unfair, and inefficient,” the President’s evolving plan includes a reduction of the corporate tax rate to 28 percent with a further reduction to no more than 25 percent for qualifying manufacturers, and greater tax incentives for research and development as well as for the production of clean energy. The plan also includes the establishment of a new minimum tax on foreign earnings. Critics immediately attacked the plan for not shifting the United States to a territorial system of taxing off-shore profits. The United States is alone in taxing multi-national companies’ foreign earnings. At the same time, the current system includes numerous provisions which allow corporations to shield foreign earnings from taxation. To be sure, the announcement has some corporate executives offering muted praise while they adopt a wait-and-see approach. The devil will be in the details; there are few at this point to fully assess the proposal. Chief among the missing elements of the proposal is how the Administration will make up for any lost revenue.

The President’s proposal has little chance of being enacted in 2012. It is more likely that the proposal will be a key element in the President’s re-election campaign, demonstrating a plan to advance domestic manufacturing while punishing corporations for not paying their fair share in taxes by keeping their earnings off-shore. Nevertheless, many are hoping for a “grand” bargain on taxes in a second term of the Obama Administration; a compromise on corporate taxes, which will likely involve extensive negotiation on current tax breaks, could form the basis of such a deal.

## A Clean Energy Standard Emerges in the Senate

*Thomas J. Spulak, Allison F. Kassir*

The Chairman of the Senate Energy and Resources Committee, Senator Jeff Bingaman (D-NM), introduced legislation last week that would establish a clean energy standard for utilities. This measure is the first serious attempt to legislate requirements that utilities produce electricity from clean energy sources since the failed “cap and trade” legislation of the last Congress. The Bingaman bill is viewed by many as a more reasonable approach to advancing so-called clean energy. Under the legislation, utilities would have to produce 24 percent of their electricity from qualifying clean sources beginning in 2005; that rate would increase by three percent per year through 2035. Qualifying clean energy sources include renewable energy such as wind and solar, nuclear power, bio-mass, coal with carbon capture and sequestration, natural gas and waste-to-energy. These qualifying clean energy sources are much broader than what had been considered in the cap and trade legislation. Utilities will be given credit for clean energy generation which may be transferred, traded or sold, similar to the trading that occurs under the Clean Air Act.

Like the President’s corporate tax proposal, the legislation has little chance of being enacted in 2012. Complicating its chances in the future is the fact that its sponsor, Senator Bingaman, will be retiring at the end of this year. Nevertheless, it lays down a marker for future attempts to enact clean energy legislation. Several reports indicate that Republicans had supported Bingaman’s concept but did not sign onto the legislation at its introduction. At the very least, its “all of the above” menu of qualifying energy sources can be used as a counter to more aggressive and limited plans in the future. One of the benefits of legislation such as this is that it would immediately incentivize the investment in clean energy, including renewables such as wind and solar, and further the development of natural gas and nuclear resources. In fact, such incentives could make expensive tax credits and other incentives relied upon by wind and solar producers not as important, thus driving down

the cost to the federal government. It is too early to tell if this legislation can find the impetus that it would need to be seriously considered but it is a well-reasoned attempt at developing a model to use in the future.

## The House Budget Dilemma - Can the House Pass a Budget Resolution?

*George C. Crawford*

House Republicans face a daunting task in putting together a budget resolution that can gather enough votes to pass. Don't look for Democrats to support any budget resolution that deviates from the spending levels contained in the Budget Control Act passed in August. Even if those numbers are followed, Democrats will be on the lookout for other provisions such as entitlement reform, tax cut extensions, reconciliation directives or attempts to rewrite the sequestration components of the Budget Control Act. These types of provisions would likely mean few, if any, Democratic votes.

That puts the Republican Leadership in a tough position of having to pass the Budget Resolution with only Republican support. The problem is a significant number of Republicans want lower spending levels than those in the Budget Control Act and numbers that low could jeopardize any chance of passing appropriation bills this year.

Complicating the picture - even if the House adopts a budget resolution with lower spending figures, the Senate will likely hold firm to the August deal.

If the budget resolution ultimately passed by the Congress sticks to the August agreement, House appropriators are hopeful of passing a handful of individual bills before the end of the year. As usual, Defense and Labor and Health and Human Services are two bills that will be used as "must pass" bills to get other appropriations bills across the finish line.

A reflection of the difficult path ahead on the Budget Resolution is that some senior House Republicans are now openly speculating that they might be forced to proceed through the year without a final Budget Resolution being negotiated with the Senate and adopted by both Houses.

In any event, look for lots of campaign fodder on both sides as the competing budget proposals from the White House and what is likely to emerge from the Congressional Republicans will set the stage for a sharp debate over tax levels, entitlement reform and discretionary spending that will continue throughout the upcoming year.

## FERC Requests Comments on Natural Gas and Electric Interdependence Issues

*David G. Tewksbury*

On February 15, 2012, the Federal Energy Regulatory Commission ("FERC") assigned a docket (Docket No. AD12-12-000) for, and requested comments on, a set of questions concerning natural gas and electric interdependence that was initially issued informally by Commissioner Philip D. Moeller. In requesting comments, FERC recognized that both industries provide services that are "critical to the health and safety of the nation," and that with natural gas "expected to be relied on much more heavily in electricity generation, the interdependence of these industries merits careful attention."

As Commissioner Moeller observed when he initially released his questions, the trend towards greater reliance on natural gas in electric generation "appears likely to accelerate as coal-powered generation is retired, renewable energy resources require more backup by natural gas plants, and low natural gas prices encourage more use of gas." He further explained that "recent problems, most importantly, the southwest outage in

February 2011, suggest that more resources need to be allocated to planning for the increased use of natural gas to generate electricity.” Commissioner Moeller argued that “this nation must ensure that outages and reliability problems are not the result of a lack of coordination between the electricity and gas industries.”

The specific questions on which FERC has requested comment are available at <http://www.ferc.gov/about/com-mem/moeller/moellergaselectricletter.pdf>. Comments are due on or before March 30, 2012.

## Congress Passes Legislation Allowing Commerce to Apply Countervailing Duties

Bonnie B. Byers

The House of Representatives yesterday overwhelmingly passed a bill (H.R. 4105), by a vote of 370 to 39, that will ensure that the Department of Commerce can continue to apply the countervailing duty law to non-market economies like China and Vietnam. The Senate on Monday had adopted a bill (S. 2153), identical to the House-passed provision, under unanimous consent. The countervailing duty law permits the United States to impose duties to offset foreign government subsidies that injury U.S. companies. The provision as it is applied to non-market economies was struck down in December 2011, when the United States Court of Appeals for the Federal Circuit (CAFC) ruled that Congress had not explicitly granted this authority to the Commerce Department when it amended the countervailing duty law in 1988 and again in 1994. The Justice Department on Monday filed a petition for a rehearing of the case, known as *GPX International Tire Corp. v. United States*, by the entire CAFC panel of judges. A decision on whether the CAFC will accept the petition for rehearing is expected in several weeks.

Passage of this legislation ensures that U.S. companies have the ability to seek relief from the massive government subsidies that the government of China provides to its exporting industries, and would ensure that the 24 existing countervailing duty order covering imports from China and Vietnam will remain in place. It was estimated that more than 80,000 jobs were at stake, if legislation were not passed and signed into law. In 2011, the United States had a record \$295 billion trade deficit with China. The bill will now be sent to the White House where it is expected that President Obama will sign it into law.

## The FEC Just Increased Reporting Thresholds on Bundling by Lobbyists - Does it Matter?

Thomas J. Spulak, Claudia A. Hrvatin

On February 21st, the Federal Election Commission increased the lobbyist bundling disclosure threshold from \$16,200 for 2011 to \$16,700 for 2012. This means that candidate committees, leadership PACs and political party committees have to report the names and addresses of any registered federal lobbyist, lobbyist employer or PAC established or controlled by either that bundles two or more contributions in a six-month period in excess of \$16,700. The intent of this disclosure is to shed light on the role lobbyists play in raising funds for candidates and parties.

Since the reporting requirement was instituted in 2009 once regulations were promulgated to accompany the Honest Leadership and Open Government Act of 2007, only 358 bundling reports have been filed with the FEC. Given that there are 535 members of the House and Senate, countless other candidates, the six party committees, approximately 300 leadership PACs and almost 13,000 registered lobbyists, it is very interesting to note how little reporting is being done.

Have the reporting requirements curbed lobbyist bundling? Are candidate committees, leadership PACs and political party committees out of compliance? Or, is reporting too easy to avoid? The consensus is that the latter is the case. One thing is certain: raising the threshold won't increase the level of reporting.

## U.S. LNG Exports - Will They be Restricted?

*Thomas J. Spulak, Allison F. Kassir*

With new techniques to access shale gas in the United States resulting in dramatic increases in supply and as a consequence, lower prices for consumers, terminals originally constructed to import liquefied natural gas (LNG) are now attempting to convert to LNG export terminals. Multiple applications to approve LNG export facilities are pending before the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC). This has caused some in Congress to complain that exporting LNG to foreign markets may result in negative economic and environmental consequences in the U.S..

Congressman Ed Markey (D-MA), the Ranking Minority Member of the House Natural Resources Committee, has introduced two bills to prohibit LNG exports and has written to Energy Secretary Steven Chu requesting written responses to 11 questions regarding DOE's evaluations and analyses related to natural gas exports.

Senator Ron Wyden (D-OR), the second ranking Democrat of the Senate Energy and Natural Resources Committee, after Chairman Jeff Bingaman (D-NM) who will retire this year, has also expressed reservations about exporting natural gas. Senator Wyden is concerned that encouraging these exports may be "trading away the enormous economic advantage of having a large, low-cost domestic natural gas supply." Senator Wyden's interest dates back several years, to 2008, when he asked DOE to reverse a policy to allow natural gas from the Kenai LNG plant in Alaska to be exported.

Congressman Markey and Senator Wyden have raised similar concerns regarding energy export issues related to oil shipped through the proposed Keystone XL pipeline. Last month, Congressman Markey proposed an amendment, which was defeated by a vote on the House floor, to ban the export of crude oil shipped through and all refined oil products whose crude oil was imported via the proposed pipeline.

House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) has pledged to fight any efforts to restrict LNG exports from the United States and has announced his intention to hold a series of hearings on the transformation of the U.S. energy industry, including one focused on the geopolitical implications of the United States becoming a large energy supplier as opposed to a large energy consumer.

As the LNG industry in the United States and worldwide continues to evolve, expect to see continued and growing interest and involvement from Congress and the Administration.

## Senator Wyden to Speak at K&S Health Law and Policy Forum

U.S. Senator Ron Wyden (D-OR) will speak at the 21<sup>st</sup> Annual Health Law and Policy Forum, a one-day conference focusing on the latest developments in the healthcare industry, organized and hosted by King & Spalding. Senator Wyden is one of the nation's leading voices on healthcare. Senator Wyden recently co-developed with U.S. Representative Paul Ryan (R-WI) a report titled "Guaranteed Choices to Strengthen Medicare and Health Security for All: Bipartisan Options for the Future," which outlines a proposal for healthcare coverage and payment for our nation's seniors. In 2006 he authored a comprehensive bipartisan healthcare reform plan with former U.S. Senator Bob Bennett (R-UT) that attracted 18 Democratic and Republican co-sponsors. Senator Wyden will share his views on bipartisan solutions to the challenges facing our country's healthcare system. The conference will take place on March 19<sup>th</sup> at the St. Regis Hotel in Atlanta,

Georgia. For more information and to register, visit: <http://www.kslaw.com/News-and-Insights/EventDetail?usnscid=5361>

## Dates to Know

March 10 - Kansas and Wyoming Republican Caucuses

March 13 - Alabama and Mississippi Republican Primaries; Hawaii Republican Caucus

March 17 - Missouri Republican Caucus

March 27 - Conference on the Renaissance of American Manufacturing: Jobs, Trade and the Presidential Election taking place at the National Press Club

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