

**Preliminary Legislative and Public Policy Outlook  
for the 110th Congress (2007-2008)**

**INTRODUCTION**

The House and Senate have now reconvened for the lame duck session, with Democrats biding their time until they officially take control of both chambers for the start of the 110th Congress in January. As legislators jockey for key positions, the new committee chairmen are in the process of developing their respective agendas. Companies impacted by the policies and activities of the federal government are facing a Democratic Congress (controlling both the Senate and House) for the first time in over a decade, and should expect significant changes in public policy as a result. The purpose of this advisory is to provide clients with a snapshot of the key issues that we believe are likely to appear on the new congressional policy agenda in January, and to provide context for those issues given the change in political control.

The most obvious agenda item in both the House and Senate will be the Iraq war; it was the public's view of the war and the administration's handling of it that helped to drive last week's vote. We anticipate oversight hearings literally within days of the opening of the new session. Reforming immigration policy, raising the minimum wage, and reauthorizing the "No Child Left Behind" education law are other priorities for Democrats. The new majority will be facing the same obstacles – passing legislation, avoiding Senate filibusters – that faced the previous Republican majority, not to mention the threat of presidential vetoes, and the mid-term elections did not provide a very large vote margin in either body.

The 2007 congressional agenda will also be colored by the 2008 presidential election cycle, which, as a practical matter, has already begun. A number of senators, including frontrunners Hillary Rodham Clinton (D-NY) and John McCain (R-AZ), as well as Evan Bayh (D-IN), Joe Biden (D-DE), Sam Brownback (R-KS), Chris Dodd (D-CT), Chuck Hagel (R-NE), John Kerry (D-MA), and Barack Obama (D-IL), have signaled their interest in running for their party's nomination for president. The Senate floor will soon become a forum for their personal platforms.

Also, while both Democrats and Republicans will try to make gains in congressional seats in 2008, Senate Republicans will have a difficult time regaining control of the Senate, and House Republicans will have an equally difficult time recapturing the seats their moderates lost in the Northeast and Midwest. In 2006, for example, only 15 Republican incumbents were up for re-election in the Senate. In 2008, that number expands to 21, six of whom are facing their first re-election. By contrast, only 12 Democrat incumbent senators will be up for re-election. Four of the Republicans are from "blue" states, and six Democrats are from "red" states, a reality that may provide a basis for more moderate views on many issues.

Based on our initial assessment of congressional leadership and committee priorities that have begun to emerge in the wake of last week's election, this advisory briefly highlights the key legislative and public policy issues within each of the following jurisdictional areas in which we have particular expertise: Banking and Financial Services; E-Commerce, Technology and Privacy; Energy and Natural Resources; Government Investigations and Oversight; Health Care; Homeland Security and Immigration; Intellectual Property; International Relations, Trade and Investment; Taxes and Finance; and Telecommunications.

## KEY LEGISLATIVE AND PUBLIC POLICY ISSUES

### Banking and Financial Services

- **Incoming Chairmen.** Incoming Chairman Barney Frank (D-MA) has expressed an interest in several key areas within the jurisdiction of the House Financial Services Committee, including pushing legislation aimed at executive pay (which stalled in the current Congress), promoting affordable housing, and tightening regulations aimed at providing further protections and remedies for consumers of banking, securities, and insurance products. Incoming Senate Banking Committee Chairman Chris Dodd (D-CT) has indicated that legislation relating to Fannie Mae and Freddie Mac, which is now stalled in the lame duck over the issue of portfolio limits, will be a priority for the committee next year. He is also considering hearings on Sarbanes-Oxley on the question of whether its provisions are creating undue burdens on small business and should be modified.
- **Predatory Lending.** In addition to generic affordable housing issues, specific legislation may be considered targeting “predatory” lending practices. Legislation in both the House and Senate that would curb certain mortgage lending practices perceived as being abusive has been stalled in recent years, but Democrats sponsoring the measures will now likely press for action. Although anti-predatory lending legislation was introduced previously by outgoing Senate Banking Committee Ranking Member Paul Sarbanes (D-MD), incoming Chairman Dodd was a cosponsor and may choose to hold hearings and try to move a bill.
- **Card Issues.** Issues that may rise to the forefront under Democratic leadership include limits on the extension of credit to minors (a long-time issue of interest for incoming Chairman Dodd), limits on fees and rates charged by credit card companies, and providing additional disclosures to consumers. The rapid growth of stored value cards and other innovative payments mechanisms has been attracting increased attention, and the coming Congress may review their use, from the perspective of enhanced consumer protections, anti-money laundering controls, and deposit insurance.
- **Hedge Funds.** Hedge funds have been increasingly scrutinized in the media and among many in Congress, as they are essentially unregulated and yet have a growing impact on the capital markets. Congress may also press Treasury and the SEC to move forward on hedge fund regulations that have now been stalled for more than three years. In fact, Senator Chuck Grassley (R-IA), the current chairman of the Senate Finance Committee, has announced an investigation into pension plans that invest in hedge funds without notifying plan participants.

- **Industrial Loan Companies.** The FDIC currently has in place a moratorium on deposit insurance for industrial loan companies, effectively precluding the issuance of any new Industrial Loan Company (ILC) charters. This moratorium is set to expire on January 31, 2007. Incoming Chairman Frank has aggressively opposed ILCs insofar as the charter would allow non-financial companies into the banking industry, but many such businesses, in the wake of financial modernization legislation reflected by the Gramm-Leach-Bliley Act, have been testing new limits. Both legislative and regulatory actions are likely possibilities in the new year.
- **Bank Capital.** The federal banking agencies are continuing to move toward finalization of new capital rules for banks, although this seems unlikely to be concluded before 2008. Various aspects of the current versions of the proposed rules have come under scrutiny in both houses, and we can expect additional hearings in 2007.
- **Housing Prices.** While the recent decline in home prices does not appear to have created serious problems for the mortgage lending industry, oversight of this issue will likely escalate, and further declines may result in additional hearings for the industry.
- **CFIUS Reform.** As discussed in more detail below under Homeland Security section, there was substantial support in the last Congress for legislation to reform the operations of the Committee on Foreign Investment in the United States (CFIUS), which falls under the jurisdiction of these committees. There is likely to be continued pressure on this issue, but it is unclear at this point how and when legislation will move.
- **Internet Gambling Rulemaking Oversight.** Recently enacted legislation aimed at improving the enforcement capabilities against Internet gambling companies may be the subject of oversight hearings in the House Financial Services and Senate Banking Committees, as the new Democratic majority monitors the progress of Treasury Department, the Federal Reserve Board, and the Department of Justice in the rulemaking/implementation process. The legislation required the agencies to develop rules for financial transaction providers to follow in identifying and blocking unlawful Internet gambling transactions. With the chief proponent of the legislation, Rep. Jim Leach (R-IA), gone from the House, it will add an interesting dynamic to what was already expected to be a contentious (and potentially extended) rulemaking process. Democrats, who largely take the view that Internet gambling cannot effectively be banned and thus should be regulated, may be more supportive of the banking industry in lessening the impact of the legislation on financial institutions and payment systems than more conservative members who oppose Internet gambling outright. In previous years, incoming House Judiciary Chairman John Conyers (D-MI) has pressed for legislation to study Internet gambling and make recommendations as to the most appropriate regulatory framework. Concerns have also been raised by industry about the precedent-setting potential of the new law, and the possibility that new legislation might be introduced to require financial transaction providers to identify and block other types of transactions deemed illegal, such as tobacco and alcohol products sold to minors or pornography.

## E-Commerce, Technology and Privacy

- **Comprehensive Privacy Legislation.** We expect that current House Energy and Commerce Chairman Joe Barton (R-TX) – one of the strongest proponents of privacy legislation in the entire Congress – will be actively engaged with incoming (and former) Chairman John Dingell (D-MI) to advance “comprehensive” privacy legislation through the House. In the 109th Congress, Chairman Barton has repeatedly called for the passage of comprehensive privacy legislation, and he continues to count it as one of his “priority” issues. Leading Democrats on the House Energy and Commerce Committee, most significantly Reps. Ed Markey (D-MA) and Jan Schakowsky (D-IL), have also called for such legislation, and we believe the shift in political power in the House only increases the likelihood that a broad-based privacy bill will be forthcoming from the committee early in the new Congress. Included in such legislation may be a vast array of other, related issues, such as the regulation of the collection and use of personal information, restrictions on the sale and use of Social Security numbers, mandates on industry to further secure data and notify consumers of breaches of security, prohibitions on deceptive practices such as spyware, phishing and pretexting, and additional limits on online marketing and advertising practices, some of which are discussed below. It is worth noting that privacy issues also have historically had traction in the House Financial Services Committee and, to a lesser extent, the House Judiciary Committee. While the Senate may take longer to act, the Senate Commerce Committee, with incoming Chairman Daniel Inouye (D-HI), appears to have enough votes to pass similarly broad privacy legislation and may once again take up such legislation, which it has not done since the last time the committee was chaired by a Democrat, former Senator Ernest Hollings (D-SC), in the 107th Congress (2001-2002). Incoming Senate Judiciary Committee Chairman Patrick Leahy (D-VT) has also been a strong advocate for privacy legislation in the past and would be expected to support broad-based privacy legislation in the next Congress as well. He has also served as the Chairman of the Senate Democratic Privacy Task Force since 2000.
- **Spyware, Phishing, and Online Behavioral Marketing/Advertising.** If the trends continue at the state level of enacting laws to prohibit spyware and phishing activities, and to regulate online behavioral marketing and advertising techniques, it will create additional pressure in the next Congress to pass federal legislation that preempts the increasing number of potentially conflicting state laws on these subjects. In the 109th Congress, spyware legislation had significant momentum in 2005, but then stalled in 2006, in part due to the perception that the existing state laws were adequate and a need for federally preemptive legislation was less necessary. Spyware legislation in the Senate was also delayed by a philosophical divide in the Senate Commerce Committee over the best approach, with an enforcement-of-existing-law approach favored by outgoing Senator George Allen (R-VA) and other Republicans on the panel, and a notice-and-choice approach adopted by S. 687, the bill sponsored by outgoing Senator Conrad Burns (R-MT) and cosponsored by Senators Bill Nelson (D-FL) and Barbara Boxer (D-CA) of the committee, and Senator Wyden (D-OR), a leading non-committee proponent and original cosponsor of the bill. While S. 687 was reported from the committee by a narrow margin, it is expected that a compromise between the two camps will not be obtainable to enable its passage in the Senate during the lame duck session. Therefore, with the departure of the leading Republican senators on this debate, it is anticipated that the Democratic cosponsors of the Burns bill will reintroduce a bill similar to S. 687 in the next Congress. The House Energy and Commerce Committee, which also

passed a similar spyware bill, H.R. 29, on a bipartisan basis, will also likely reintroduce its bill for the third consecutive Congress. Additional bills are also likely to be introduced on phishing, a growing public concern and emerging issue in state legislatures. Behavioral marketing and advertising tools, particularly the use of cookies and similar commercial technologies, are also likely to be the focus of new legislation promoted by Democrats, who are anticipated to introduce a greater number of consumer protection bills.<sup>1</sup>

- **Social Networking and Online Pornography.** The House passed a social networking website bill, H.R. 5319, sponsored by Rep. Michael Fitzpatrick (R-PA), over the stated objections of several leading Democrats in July, 2006, but the bill soon stalled in the Senate. It is likely, however, due to the increasing press attention on MySpace, Facebook, and other social networking websites about the potential harms that can befall minors using such sites (e.g., predators' ability to communicate with minors, exposure to minors of harmful content), it is likely that a variety of regulatory proposals affecting such sites (and potentially other websites providing similar communications services) will be considered early in the next Congress. Additionally, lawmakers are expected to introduce bills aimed at improving law enforcement's ability to track child predators and combat the purchase of illegal online child pornography. Such proposals are likely to require Internet service providers and other websites to assist law enforcement in any number of ways, such as through increased reporting of crimes, broader preservation of evidence, and potentially longer required periods of data retention related to consumers' usage. The data retention periods promoted by law enforcement, however, conflict with privacy proposals aimed at limiting the collection of consumer information, and that debate is likely to play out in the Commerce and Judiciary Committees of both the Senate and House.
- **Telephone Record Pretexting.** Among other telephone record pretexting bills introduced in the 109th Congress, the bill sponsored by outgoing Senator Allen, S. 2389, still has an opportunity to pass the Senate in the lame duck session. Current Republican Majority Leader Bill Frist (R-TN), retiring at the end of this Congress, has expressed interest in passing S. 2389 after first coupling it with the House Judiciary Committee pretexting bill, H.R. 4709, sponsored by Rep. Lamar Smith (R-TX), which unanimously passed the House in April, 2006. If efforts fail in the lame duck session to pass this combined legislation in the Senate and the House, it is likely that a similar telephone record pretexting bill will be introduced early in the next Congress. Such a bill, if not bogged down with unrelated privacy provisions, would likely have the opportunity to move through Congress much more quickly than either a comprehensive privacy or data security bill, especially in light of the telephone record pretexting scandal that erupted on the Hill after Hewlett-Packard revealed that it hired investigators who used pretexting techniques to obtain the telephone records of its board members.
- **High-Tech Competitiveness.** Incoming House Science Committee Chairman Bart Gordon (D-TN) has demonstrated strong support for promoting U.S. high-tech competitiveness. In the past, he has pressed for legislation that would provide for a 10 percent increase per year in funding for basic research in the physical sciences, mathematical sciences and engineering at the principal agencies supporting such research.

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<sup>1</sup> Spurring introduction of the latter may be the recent complaint filed with the Federal Trade Commission (FTC) by the U.S. Public Interest Research Group (U.S. PIRG) and Center for Digital Democracy, highlighting concerns with online marketing practices they believe are harmful to consumers and should be unlawful under the FTC Act.

- **Internet Access and Sales Taxes.** See discussion in *Taxes and Finance* section below.
- **Copyright Issues – Digital Media Content Protection.** See discussion in *Intellectual Property* section below.

## Energy and Natural Resources

- **Global Warming.** Climate change will be a topic of increased discussion in Congress. Senator Barbara Boxer (D-CA), incoming chairman of the Senate Environment and Public Works Committee, and Senator Jeff Bingaman (D-NM), incoming chairman of the Senate Energy and Natural Resources Committee, have already expressed interest in legislation regulating carbon emissions, and this week Senator Boxer announced her intention to hold hearings on global warming. It remains unclear whether a greater emphasis on this important environmental issue will translate into legislation that both Congress and the president can agree upon. In the House, incoming House Energy and Commerce Chairman John Dingell (D-MI) has also expressed a willingness to hold hearings on climate change, but he has also indicated an interest in learning the facts while remaining non-committal regarding passing actual legislation.
- **Renewable Energy and Efficiency.** In the House, Speaker-elect Nancy Pelosi (D-CA) stated that within the first 100 hours of the new Congress, the House will repeal subsidies for big oil companies. We expect a concerted effort to reduce or eliminate some of the subsidies for oil companies enacted in the 2005 Energy Bill and to increase spending to promote all forms of renewable and energy. Incoming Chairman Dingell has expressed support for nuclear power and alternative fuels as means to promote energy independence, but remains opposed to increasing automobile fuel efficiency standards. Senator Bingaman also is a strong supporter of nuclear energy, and a stronger supporter of renewable energy than his predecessor, Senator Pete Domenici (R-NM). Senator Bingaman will likely press for more drilling for oil and gas in the Gulf of Mexico.

## Government Investigations and Oversight

- **Increase in Congressional Oversight.** The Democrat-led House and Senate in the 110th Congress will mark the return of some familiar names to leadership positions on committees holding broad and significant oversight jurisdiction. As noted previously, other members, some of whom will hold leadership positions, have expressed an interest in running for president. These factors, coupled with the sense that the public is demanding accountability from the Bush administration on the Iraq war, means that an up-tick in congressional investigations and oversight is widely anticipated, if not certain. An increase in oversight hearings of executive branch agencies would likely lead to more hearings, investigations, and subpoenas for businesses that do business with the federal government or are affected by federal policy. One likely topic for hearings and congressional investigation is “waste fraud, and abuse” of government contractors, particularly those that do business in Iraq, and those that have government contracts with FEMA. Congressional investigative and oversight hearings typically move on a very fast track, and we anticipate that a substantial number of companies and individuals will be asked to provide information to, and to appear before, congressional committees over the next two years.

- **Incoming Chairmen.** Rep. Henry Waxman (D-CA) will once again chair the Committee on Government Reform. During his previous tenure, Rep. Waxman led aggressive investigations of the tobacco industry and of steroid use in professional sports. Rep. Waxman will likely use the Government Reform's broad oversight function (the committee has no legislative jurisdiction) to conduct high-profile investigations related to the government-related waste, fraud, and abuse. Likely targets of interest include Iraq, homeland security, and post-Katrina rebuild. Incoming Energy and Commerce Chairman John Dingell (D-MI) previously held hearings examining the Department of Defense's practices, as well as the drug industry. Rep. John Conyers (D-MI) will chair the House Judiciary Committee. Rep. Conyers was the ranking minority member during the committee's impeachment hearings related to President Clinton and the House Judiciary Committee historically entertains a range of highly volatile political issues. Senator Carl Levin (D-MI) will chair the Permanent Subcommittee on Oversight and Investigations of the Committee on Homeland Security and Governmental Affairs. Like Rep. Waxman, Senator Levin has historically led investigations of several high-profile areas, including the gas and tax shelter industries.

## Health Care

- **Prescription Drugs.** Both the House Energy and Commerce Committee and the House Ways and Means Committee will look to institute direct government negotiations with prescription drug manufacturers for Medicare beneficiaries and promote ways to increase generic drug utilization. Direct negotiations on drugs is listed among the six priorities in Speaker-elect Pelosi's First 100 Hour agenda. The Ways and Means Committee also will scrutinize the implementation of the new Medicare Part D drug benefit, and it will likely attempt to address the program's "doughnut hole," a coverage gap that requires beneficiaries to pay for drugs out of pocket when their costs in any given year total between \$2,250 and \$5,100. At the Senate Health, Education, Labor and Pensions Committee, the reauthorization of the Prescription Drug User Fee Act and the importation of prescription drugs from overseas will be the focus for 2007.
- **Medicare Part C and D.** In the Senate Finance Committee, incoming Chairman Max Baucus (D-MT) will be interested in addressing Medicare Part C and D. Though an author of the Medicare Modernization Act, incoming Chairman Baucus has been sharply critical of managed health care and the prescription drug benefit. He would like to reduce what he perceives are overpayments to health plans, review their marketing practices, and require them to share more data with the government. He is also interested in addressing physician ownership of and self-referral to specialty hospitals.
- **Budget Reconciliation.** We expect the Democrats will be able to enact a budget that includes budget reconciliation instructions on Medicare. The effort in the Senate will be led by Senator Kent Conrad (D-ND). Budget reconciliation provisions typically instruct the committees of jurisdiction to find savings in mandatory programs. With a requirement to reduce Medicare spending, budget reconciliation would turn into a legislative vehicle to address a whole host of Medicare provisions. Democrats in both chambers have expressed their interest in re-instating pay-as-you-go ("PAYGO") legislation, meaning any federal government spending would be offset by reductions in other federal programs. The most likely vehicle for PAYGO would be the congressional budget resolution in March.

- **For-Profit Health Care.** In the House, incoming House Ways and Means Health Subcommittee Chairman Pete Stark (D-CA) has been highly critical of for-profit health care and will use his post to produce a series of oversight hearings highlighting the overpayment of providers and the lack of accountability for their services.
- **Electronic Records.** Senator Ted Kennedy (D-MA), as incoming Chairman of the Senate Health, Education, Labor and Pensions Committee, has said he would like to require health systems to adopt electronic medical records and make them easier to transmit between providers.

## Homeland Security and Immigration

- **Incoming Chairmen.** Senator Joe Lieberman (I/D-CT) will be the new chairman of the Senate Homeland Security and Governmental Affairs Committee. Despite changing his affiliation from Democrat to Independent, Senator Lieberman retained his seniority on the panel. Rep. Bennie Thompson (D-MS), the current ranking Democrat on the House Homeland Security Committee, will be its new chairman.
- **9-11 Commission Recommendations.** This fall, Speaker-elect Pelosi promised that if the Democrats took control of the House, they would pass, as part of its first 100 hour agenda, legislation that would enact all of the recommendations of the 9-11 Commission. Recent media reports indicate that there is discussion ongoing about what, exactly, that promise means. However, the Democrats clearly must take quick action to establish that they are tough on national security issues. This September, Rep. Thompson issued a fairly detailed report on implementing the 9-11 Commission's recommendations. This report, entitled "Real Security," may serve as the Democrat's long-range agenda in this policy realm.
- **Infrastructure Protection.** Democrats may also focus on increasing cargo scanning, possibly ultimately setting a deadline for 100 percent scanning of U.S.-bound cargo. It is likely that legislation may be introduced to include increased funding for such areas as port security, cyber-security, rail and transportation security, Bioshield and biodefense, nuclear power plant security, and other infrastructure protection initiatives. In particular, this past summer, Rep. Thompson introduced the Rail and Public Transportation Security Act of 2006 (H.R. 5714) which stalled. His bill would have authorized (but not appropriated) at least \$3 billion for various rail and mass transit security measures for up to six years. Aggressive action on a successor to this bill is now likely.
- **Port Security.** With the exception of 100 percent cargo scanning mentioned above, because Congress enacted a major piece of port security legislation, the SAFE Port Act of 2006, just a little more than a month ago, it will probably not be immediately undertaking major new initiatives in this area beyond funding increases. Rather, it will primarily be concerned with exercising its oversight role in connection with the mandates established in the SAFE Port Act. However, many of those mandates are potentially highly significant for port security generally. The SAFE Port Act charges eight congressional committees with oversight of port security issues. That explicit mandate, coupled with the overwhelming importance of committee chairmanship in the workings of Congress, means that the ascension of new Democratic chairmen to leadership positions in the relevant committees will be a matter of central importance to port security going forward.

- **Public Health.** Even before the 110th Congress begins, Democrats have been proposing that the Senate take up pandemic preparedness (e.g., avian influenza) and bioterrorism legislation. The legislation would likely require greater coordination and monitoring of vaccine production. As to Bioshield and biodefense, Democrats are likely to reconsider the scope and extent of liability protection for vaccine manufacturers.
- **Strategic Planning.** Democrats may require the Department of Homeland Security (DHS) to conduct a Quadrennial Homeland Security Review, similar to the Department of Defense's Quadrennial Defense Review.
- **Immigration/Border Security.** Although not a specific Democratic priority for next year, legislation pushed by President Bush, but opposed by many conservatives in Congress, may be revived under a Democratic majority. This year the House passed an enforcement-first bill (H.R. 4437), but refused to go to conference to reconcile with broader legislation that included action on the status of the domestic illegal population (S. 2611) that passed the Senate. Many House Democrats look favorably on language providing a path to citizenship for long-time illegal aliens residing in the United States, but labor leaders (a traditional Democratic constituency) have expressed reservations about proposed guest worker programs. Also, Rep. Thompson has stated that the incoming Congress will review the recently enacted Secure Fence Act of 2006 (H.R. 6061), which requires the installation of approximately 700 miles of fencing along the U.S.-Mexico border. Rep. Thompson identified DHS's Secure Border Initiative (which uses surveillance systems instead of a physical barrier), as an alternative to building a fence.
- **Flood Insurance.** Opposition from Louisiana Senators Mary Landrieu (D-LA) and David Vitter (R-LA) has stifled activity on comprehensive flood insurance reform. If the legislation fails to make it through the current lame duck session, it is likely to come back next year.
- **Chemical Security.** On October 4, 2006, President Bush signed H.R. 5441 which makes important changes in the context of chemical facility security, including requiring DHS to issue interim final regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities. The proposed regulations should be published soon, but Democrats may pursue even more comprehensive and permanent chemical security legislation.
- **Foreign Investment in U.S. Infrastructure.** Given the controversy at the beginning of this year regarding the Bush administration's decision to approve the takeover by DP World of port operations at a small number of U.S. ports and the recent publicity regarding the planned merger of Lucent Technologies and the French-owned telecommunications company Alcatel, it is likely that the new leadership will feel pressure to act on legislation revamping the approval process for such investments. Both Houses passed legislation earlier this year, but agreement has not yet been reached on a consensus product. In the Senate, the issue falls within the jurisdiction of the Banking Committee – the extent to which incoming Committee Chairman Dodd's presidential aspirations may affect consideration of the measure is unclear but the likelihood is that major new investments will attract political attention as they have in 2006 and perhaps even more so as the 2008 presidential election draws near.

- **Insurance/Risk Transfer.** Because of timing issues, the Democratic leadership will be forced to wrestle with the complex issue of terrorism insurance. Under the Terrorism Risk Insurance Act (TRIA), federally-backed terrorism insurance will expire on December 31, 2007. Whether Congress renews TRIA in its current form, develops an alternative to federally-backed terrorism insurance, or allows the law to expire, will be important ingredients in the legislative debate that will inevitably take place after Congress returns in January. Key sectors of the economy – including real estate holders, financial lenders, and the insurance industry – all have significant interests in the matter and will likely be asked to testify as Congress debates its next steps.

## Intellectual Property

- **Impact on Industry of Democratic Congress.** The congressional shift in control to Democrats may result in better odds for passage of intellectual property legislation favoring industries that traditionally have been more supportive of Democrats than Republicans, such as the film and music industries. Industries that have maintained support on both sides of the aisle, such as the information technology industry, should also fair well on these issues in the new Congress. However, Republicans have increasingly engaged in, and championed, intellectual property issues during the course of their committee leadership the past two Congresses, and industries that have lobbied Republicans successfully on these issues will continue to have an impact in a Congress featuring very small voting margins for the majority. With the committee and subcommittee agendas now being set by the Democrats, however, it is expected that more committee consideration will be given to intellectual property legislation in this Congress than in the recent past, even if passage of the bills by Congress is not necessarily assured.
- **Judiciary Committee and Subcommittee Chairmen.** The Senate Judiciary Committee will once again be led by Chairman Patrick Leahy (D-VT), who last chaired the Committee in the 107th Congress (2001-2002). Incoming Chairman Leahy has long been the leading Democrat on intellectual property issues in the Senate Judiciary Committee, and is currently serving in the 109th Congress as ranking member of both the full committee and its Subcommittee on Intellectual Property. Incoming House Judiciary Committee Chairman John Conyers (D-MI), by contrast, is likely to defer substantive consideration of intellectual property issues to the incoming Chairman of the committee's Subcommittee on Courts, the Internet, and Intellectual Property. With the current jockeying for position underway among Democrats in the House, the chairman of the subcommittee has not yet been named, but will most likely be either the current subcommittee ranking minority member, Rep. Howard Berman (D-CA), or the next in seniority on the subcommittee, Rep. Rick Boucher (D-VA). The difference between the two potential chairmen is significant with respect to their views on copyright matters, and the outcome could significantly alter the consideration and direction of such legislation in the new Congress, as discussed further below.
- **Patent Reform Bill.** Senator Leahy cosponsored the comprehensive "Patent Reform Act of 2006" (S. 3818), introduced in August, 2006, by outgoing Intellectual Property Subcommittee Chairman Orrin Hatch (R-UT), who was recently re-elected to the Senate for his sixth term. At the time of the bill's introduction, Senator Leahy stated, "This legislation is not an option, but a necessity." His desire to move a comprehensive patent reform bill is not expected to diminish, and given his long-standing working relationship with Senator Hatch on an area

of common ground (unlike, for example, judicial nominations), we expect the two Senators will continue to work together in the next Congress to have the Judiciary Committee consider and report to the Senate floor a patent reform bill. Based on the broad scope of the current Hatch-Leahy bill, it is likely that a bill introduced by incoming Chairman Leahy next Congress would have the same overarching goals – increasing patent quality, increasing international harmonization, and decreasing unwarranted or abusive patent litigation. It could, however, vary in its substantive details, as Senator Leahy previously noted that S. 3818 is the product of compromise and is not the bill he would have written as its sole author. How a Leahy-Hatch compromise on certain patent reform provisions will fare in the legislative hearings and debates to come on a new bill's substantive provisions remains to be seen in the next Congress.

In the House, patent reform issues should again take center stage, regardless of whether Rep. Berman or Rep. Boucher is named chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, because the two congressmen together introduced and cosponsored a patent reform bill in 2006, the “Patents Depend on Quality Act” (H.R. 5096). The Berman-Boucher bill was more limited in scope than either the Senate bill or the comprehensive House patent reform bill, originally introduced by outgoing Subcommittee Chairman Lamar Smith (R-TX), and both congressmen would be expected to push for patent reform legislation similar to H.R. 5096 in the new Congress. Finally, a very narrow patent bill that could move separately, and therefore more quickly, in the next Congress would be one similar to H.R. 5418, introduced by Rep. Darrell Issa (R-CA) and cosponsored by Rep. Adam Schiff (D-CA), which passed the House in 2006. The Issa-Schiff bill would establish a 10-year pilot program in certain United States district courts “to encourage enhancement of expertise in patent cases among district judges.”

- **Copyright Issues – Digital Media Content Protection.** Copyright issues are also expected to remain hot topics of debate in the next Congress, particularly with respect to bills promoting the protection of digital media content. If the efforts of outgoing Senate Commerce Committee Chairman Ted Stevens (R-AK) to pass the multi-titled Senate telecom reform bill (H.R. 5252, as amended and reported by the committee) fail in the lame duck session, as expected, then it is very likely that the video and audio broadcast protection provisions added as title IV in the Senate version of the bill will be reintroduced in the next Congress as stand-alone legislation. These provisions are more commonly known as the “[video] broadcast flag” and “audio broadcast flag” proposals, respectively, because they would authorize the Federal Communications Commission to mandate that video and audio content delivered via digital broadcast (or satellite radio, in the case of audio) be flagged so that receivers will maintain limitations on the copying or redistribution of such content.<sup>2</sup> Another copyright bill introduced in the House Judiciary Committee this past Congress that is likely to be reintroduced and receive more consideration next Congress is one designed to close the so-called “analog hole” by prohibiting the conversion of analog video content to digital form unless it would be encoded to maintain certain content protection limitations, such as copying and redistribution rights.

With respect to copyright issues, the naming of the next chairman of the House Subcommittee on Courts, the Internet, and Intellectual Property, will likely have a significant impact on the handling and direction of such issues in the next Congress. Current Subcommittee

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<sup>2</sup> The more controversial of the two proposals, the audio broadcast flag, was introduced in the House in the 109th Congress as a separate bill and supporters may yet try to have it move separately in the lame duck session.

Ranking Member Berman has a long track record as a strong supporter of content protection measures on behalf of copyright owners and would likely bolster within the House Judiciary Committee any efforts of the House Energy and Commerce Committee to take up broadcast flag legislation. Alternatively, Rep. Boucher would closely scrutinize such legislation and likely impede its passage, both as subcommittee chairman and as a member of the House Energy and Commerce Committee, unless it contained measures to ensure that consumers could make “fair use” of such content without the authorization of the copyright owner. Additionally, Rep. Boucher, would likely again seek passage of a bill similar to the “Digital Media Consumers' Rights Act of 2005” (H.R. 1201), which he introduced the past two Congresses. Such a bill would, among other things, amend section 1201 of the Digital Millennium Copyright Act of 1998 to create certain fair use exceptions to rules prohibiting the circumvention of technological measures protecting digital media content.

## International Relations, Trade and Investment

- **Timing.** In the near term (the next several weeks), Congress will be preoccupied with a lame duck session, which is unlikely to address any critical trade or investment issues before the holiday recess, and extensive organizational reshufflings resulting from the change of control. Therefore, Congress likely will not be in a position to turn to substantive trade or investment issues until at least the beginning of its new session in January 2007.
- **Free Trade.** The Democrats as a whole are likely to be less supportive of free trade than their Republican colleagues. In what are almost certain to be battleground states in the upcoming presidential election of 2008 – Ohio, Pennsylvania and Missouri – newly elected freshmen senators ran on strongly protectionist platforms. In light of the significance of these states in the national election process, these senators may enjoy a disproportionate influence over party positions on trade and economic policy. Thus, these junior “fair trade” Democrats may limit somewhat the flexibility of more experienced pro-trade committee chairs to approach trade and investment issues in a more evenhanded way. While Congress generally will remain sensitive to certain types and sources of foreign investment – as it has been in 2006 – there may be more latitude for “fair-trade” advocates in the new Congress to press their case. Adding to a somewhat more circumscribed flexibility for committee chairs, party discipline will be at a premium for the next two years, with Democrats eyeing recapture of the White House in 2008. Therefore, it may be more difficult to get individual members to break from the party line. Thus, Democrat free-trade advocates may have less room to maneuver than was the case when they were in the minority. Also, committee assignments for freshman members, especially in the Senate, could affect the political climate. Senator-elect Sherrod Brown (D-OH), in particular, ran on a platform of virulent opposition to the Oman Free Trade Agreement and could well seek to influence trade and investment policy if assigned to an appropriate committee. Finally, the losses of Reps. Jim Leach (R-IA) and Clay Shaw (R-FL), as well as Senator Lincoln Chafee (R-RI), all Republican moderates, will deprive the Republicans of senior internationalist voices.
- **Senate Finance and House Ways and Means Committee Chairmen.** The Senate Finance and House Ways and Means Committees will operate in a difficult environment on trade. Committee chairs hailing from the moderate, Democratic Leadership Council wing of the Democratic Party will encounter pressure, particularly in the Senate, from freshmen who campaigned on an aggressive fair-trade platform. The situation will test the pro-business

bona fides of newcomers in the House, while narrow Democratic majorities will require compromise with the GOP for major trade bills to win passage. The key will be the degree to which incoming Senate Finance Committee Chairmen Max Baucus (D-MT) and incoming House Ways and Means Chairman Charlie Rangel (D-NY), pragmatic pro traders known for cutting deals, will have the flexibility to deal with populist pressures from within their party.

- **Potential Trade Votes.** Key matters that may face votes on trade in the 110th include: extension of the Generalized System of Preferences and the Andean Trade Promotion Act; the provision of Permanent Normal Trade Relations to Russia; ratification of completed Free Trade Agreements (FTAs) with Peru and Colombia; ratification of FTAs now under negotiation with Korea, Malaysia, and the United Arab Emirates; the potential renewal of fast track Trade Promotion Authority; legislation to replace the expiring Farm Bill of 2002; reform of the nation's regulation of foreign investment (CFIUS – *see discussion above under Homeland Security/Immigration for further discussion of CFIUS reform*); and potential legislation regarding global currency and exchange rate manipulation. Expect the 110th Congress to find bipartisan consensus on enforcement of U.S. trade laws, particularly regarding China, but to face heated debates over the administration's free-trade strategy.
- **House International Relations Committee Chairman Lantos.** Under the chairmanship of Rep. Tom Lantos (D-CA), the House International Relations Committee is expected to examine closely the administration's awards of U.S. government contracts in Iraq and Afghanistan. This in turn may lead to more open competition in future contracting. As ranking minority member on the committee in the last Congress, Rep. Lantos promoted exceptionally collegial relations with retiring Chairman Henry Hyde (R-IL). As chairman, he remains one of the senior Democrats' few supporters of the war in Iraq, but he is expected to turn a critical eye to the administration's policies on the Israeli-Palestinian conflict, Lebanon, and Saudi Arabia. In stark contrast to the administration, Rep. Lantos is also a proponent of direct U.S. dialogue with Syria and Iran. More broadly, as one of the Congress' leading supporters of political rights and civil liberties in foreign countries, Rep. Lantos is likely to devote considerable attention to promoting these freedoms abroad.
- **Iran Sanctions.** The likelihood of accelerated U.S. attempts to secure sanctions against Iranian nuclear proliferation may expose U.S. trading partners to increasing scrutiny and, in an extreme case, to possible extraterritorial sanctions.

## Taxes and Finance

- **PAYGO.** The 110th Congress should prove to be a volatile period for corporate taxpayers. The Democrats have long-argued that the budgetary pay-as-you-go ("PAYGO") rules, which expired years ago, should be reinstated. PAYGO rules would require that federal government spending would need to be offset by reductions in other federal programs, and if reinstated, the search for revenue offsets will be on. This means that even popular tax relief, such as the R&D credit and child tax credit, would have to be offset with corresponding revenue raisers. Both of those provisions, along with nearly 40 other popular tax breaks, expired at the end of 2005. It may yet fall on the Democrats to retroactively extend those measures when they assume control in 2007.

- **Shifting Focus of Congress.** It will be important for the Democrats to present themselves as centrists and protectors of the middle-class during this two-year run up to the 2008 election cycle. This is undoubtedly why they have pledged not to repeal the middle-class tax cuts enacted in 2001 and 2003, nor will they repeal the 15 percent dividends and capital gains tax rate that was extended this year to 2010. The battleground in 2007 and 2008 will focus on international tax policies deemed to promote “run away plants” or that bless operations in “tax havens.” High-income individuals (the “rich”) will be in the political cross-hairs, however, and the estate and gift tax debate may be finally resolved. It is possible pressure to raise revenues will result in the deferral or repeal of provisions enacted in the American Jobs Creation Act of 2004, which have not yet gone into effect. Democrats may call for reviving the windfall profits tax on large oil companies and superfund taxes for funding environmental remediation. As noted previously, the \$1 million deduction cap on executive pay will be revisited, with significant restrictions placed on performance-based compensation. It is also likely that statutory codification of the judiciary’s economic substance doctrine will emerge as a tax increase on tax-shelters. This proposal raises \$18 billion and has been passed by the Senate many times, only to be blocked in conference by the Republican-controlled House. That dynamic will soon change.
- **Tax Gap.** Incoming Senate Finance Committee Chairman Max Baucus (D-MT) is a vocal critic of the so-called “tax gap” – the difference between the amount of taxes that should be collected under current law and the amount actually collected. The Joint Committee on Taxation has issued two reports on proposals to close the tax gap, and all of the ideas in those reports are now on the table. This has significant implications for the business community.
- **Internet Access and Sales Taxes.** Outgoing Senator George Allen (R-VA) led the effort in the 109th Congress to make permanent the moratorium on state imposition of Internet access taxes and “multiple and discriminatory” taxes on Internet transactions. Senator Allen and Senator Wyden (D-OR) worked in a bipartisan fashion to extend and modify the existing Internet tax moratorium in the 108th Congress. With Senator Allen’s departure, and the change in control in the Senate, the fate of the current moratorium – set to expire in November 2007 – is unclear and likely to be a key issue again in the first session of the 110th Congress. Unless last-ditch efforts to make the moratorium permanent in the lame duck session succeed, the issue could be contentious and expand into a full-blown debate on Internet taxes, including sales tax. Senator Byron Dorgan (D-ND), a leading opponent of Internet tax moratoria, is expected to make passage of a permanent extension on Internet access taxes difficult, at a minimum. He may also condition such passage on the Senate passing Streamlined Sales Tax Project (SSTP) legislation – federal authorization for states to require remote sellers to collect and remit sales tax for online purchases of goods and services.
- **Other Issues.** Other important developments will include continued congressional scrutiny of tax-exempt hospitals, charities, and colleges and universities. The Senate Finance Committee will expand its investigation of pension plans that invest in hedge funds, which may force committees with SEC jurisdiction to jump into the fray. There will be continued efforts to modify the 2006 pension bill. The tax reform debate will continue to grow in importance and rhetoric, as we move ever closer to the expiration of the 2001 and 2003 tax cuts in 2010. We should anticipate significant tax reform developments as the various presidential campaigns search for winning issues.

## Telecommunications

- **Net Neutrality.** The issue of net neutrality is certain to remain a priority for Democrats in both the House and the Senate. “Net neutrality” is the term used to describe the public policy initiative aimed at prohibiting broadband networks from offering prioritized services or differential pricing for certain types of data, classes of applications, or network destinations. Although a variety of complex issues are involved, proponents generally argue that net neutrality legislation will promote innovation, competition, and fairness in the use of broadband networks. Opponents, on the other hand, argue that net neutrality legislation will prevent the network owners from recouping their investments, could be damaging to network operations, and may have negative privacy and public safety implications.

In the House, incoming Judiciary Committee Chairman John Conyers (D-MI) will likely continue to pursue antitrust-based net neutrality legislation similar to the bill he cosponsored with outgoing Judiciary Committee Chairman James Sensenbrenner (R-WI). The Conyers-Sensenbrenner bill would amend the Clayton Antitrust Act to prohibit discrimination by network operators in the rates and terms charged to unaffiliated content, service, and application providers for interconnection. Speaker-elect Pelosi has also indicated that net neutrality is an important issue to her.

Rep. Rick Boucher (D-VA), a member of both the House Judiciary Committee and House Energy and Commerce Committee, also anticipates continued engagement on the issue. Rep. Boucher was the cosponsor, together with Rep. Markey (D-MA) (House Energy and Commerce Telecommunications Subcommittee Ranking Member and expected Subcommittee Chair in the upcoming Congress) of a net neutrality amendment, ultimately rejected by the House during consideration of H.R. 5252, the Communications Opportunity, Promotion, and Enhancement (COPE) Act, sponsored by current Energy and Commerce Chairman Barton. Unlike the amendment offered in the 109th Congress, Rep. Boucher anticipates adding a sunset provision to a new net neutrality proposal to be introduced next Congress – the sunset date for the provision would be determined after a market-by-market analysis of last-mile transmission speeds. Rep. Boucher has recently observed that until the issue is resolved, net neutrality will continue to be debated in the context of other legislative issues in the future.

In the Senate, Senator Dorgan (D-ND), who cosponsored net neutrality legislation this Congress with Senator Olympia Snowe (R-ME) and incoming Senate Commerce Committee Chairman Daniel Inouye (D-HI), has already announced his intention to pursue the same in the next Congress. Current proponents of net neutrality include a small but determined group of Senators that are blocking current Commerce Committee Chairman Ted Stevens (R-AK) from securing the 60 votes required to obtain cloture on the Advanced Telecommunications and Opportunity Reform (ATOR) Act (H.R. 5252, as amended by the Senate Commerce Committee). If these efforts fail in the lame duck session, similar attempts to pass a new version of ATOR are likely to be exacerbated in the next Congress, as the number of net neutrality proponents is expected to increase with the Democratic-led Senate. Three new Democrats were named to the Senate Commerce Committee, and one, Senator-elect Amy Klobuchar (D-MN) has already announced her support for net neutrality.

- **Merger Review/Communications Antitrust Enforcement.** The issue of merger review from both an antitrust perspective by the Department of Justice and the Federal Trade Commission and a competition/public interest perspective by the Federal Communications Commission (FCC) will inevitably grow in fervor when the Democrats take control of Congress. Incoming House Judiciary Chairman Conyers, a vocal critic of consolidation in the communications and media industries, will place a high priority on evaluating the standards of review applied in the recent flood of cable and telecommunications mergers and the appropriateness of the resulting structural and market oriented conditions. Rep. Conyers is also expected to examine the Toomey Act and legislation to clarify the existence of antitrust enforcement authority under the Communications Act. Likewise, incoming Commerce Chairman Inouye stated that the committee will hold a hearing on the AT&T-Bell South merger, if the FCC has not approved the merger by next year. Incoming Judiciary Antitrust Subcommittee Chairman Herb Kohl (D-WI), already an active participant in merger review oversight, will likely continue to be active on these issues.
- **Telecom Reform.** The momentum to pass comprehensive Telecommunications Act reform legislation, including video franchising reform, is likely to lessen during the 110th Congress. Democratic majorities in both the House and Senate, the shift in committee chairmanships, and the increasing number of states which have enacted video franchising legislation take the pressure off federal legislators to act. However, the possibility remains that individual issues included in the current House and Senate bills may be addressed piecemeal.
- **Telephone Record Pretexting** – See discussion in *E-Commerce, Technology and Privacy* section above.
- **Internet Access and Sales Taxes.** See discussion in *Taxes and Finance* section above.
- **Copyright Issues – Digital Media Content Protection.** See discussion in *Intellectual Property* section above.

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