



## Government Affairs Post-Election Analysis

November 10, 2006

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Covington & Burling LLP is a leading international law firm with more than 550 lawyers, and offices in Washington, New York, San Francisco, London, and Brussels. Our bi-partisan government affairs team brings its expertise in policy-making and Congressional procedure, extensive executive branch and congressional experience, and substantive knowledge to achieve our clients' legislative and regulatory goals consistently.

### Post-Election Overview:

The 2006 midterm elections profoundly changed the direction in Washington. Both the President and the new Democratic majorities in Congress received the same message from the voters – the American people voted for a change in policy, particularly in Iraq, and for more civility, integrity, and bipartisanship in handling the nation's affairs.

Congress will move quickly on moderate issues with broad support, such as raising the minimum wage, permitting Medicare negotiation of drug prices, implementing the recommendations of the 9/11 Commission, passing lobbying reform, implementing "pay-go" budget rules, and increasing incentives for alternative energy development and energy independence. Congress will also press for changes in Iraq, heavily influenced by the recommendations of the Baker-Hamilton Commission, and commence significant oversight activities.

Beyond these popular initiatives, the Democratic agenda is less clear, but in this client memo, Covington's Government Affairs Practice Group has drawn on our expertise in various areas to identify issues, key players, and potential initiatives in the new Congress. The agenda and direction of the new Congress remains fluid, and this memorandum could not possibly address all topics. We encourage you to contact any of the individuals listed in this memorandum for additional information.

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## Congressional Oversight

Oversight and investigation by the Democratic majority in the House will be extensive, broad based, and aggressive. The Democratic Senate will also undertake investigations, although primarily limited to oversight in areas in which there is bipartisan support. After six years of minimal congressional oversight, the Bush Administration, along with the businesses perceived to have benefited from the legislative and regulatory actions of recent Congresses and the Administration, will face a radically different climate. Nearly every committee of Congress will likely participate in oversight on a broad array of issues, including those that are well anticipated like Iraq redevelopment fraud, and those that are sometimes overlooked by the press such as hedge fund oversight. Importantly, while the popular press will focus on the prospects of high profile actions, such as subpoenaing Administration officials or investigating Iraq contractors, a broad array of private sector companies will also face scrutiny. The 2008 presidential election will also influence the investigative agenda. Because national press attention will shift to the presidential primaries in early 2008, the most sensational and high profile congressional hearings will likely occur in the first year of the new Congress. In 2008, investigations will continue with less public attention, but they will nonetheless be a reality for corporate America.

**Private Sector Impact:** Although Republicans and their policies will be the focus of the investigations, the private sector will also be caught up in the subpoenas, document requests, and demands for testimony. Four broad categories of companies face investigative risks:

- Companies that have benefited from the legislative and regulatory actions of recent Congresses and the Administration, including recipients of tax relief, recipients of appropriation earmarks, recipients of regulatory relief, companies that avoided additional regulation, and large federal contractors, particularly those that received no-bid contracts.
- Companies connected to alleged Bush administration failures or abuses, such as telecommunication and Internet companies that responded to warrantless wiretap orders, or the companies that provided services to Katrina victims.
- Companies and industries that may be perceived as having close ties to the Bush Administration, such as the participants in the Vice President's energy task force.
- Companies alleged to have participated in corporate abuses, such as excessive executive compensation or backdated stock options.

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The companies that benefited directly from the legislative and regulatory actions of recent Congresses and the Administration face the most immediate risks. Investigators can be expected to look for sweetheart contracts, administrative cost overruns, waste and fraud, and narrow appropriation earmarks. Even companies that benefited from policies adopted on a bipartisan basis may find investigators revisiting these decisions and forcing companies to rejustify the basis for the actions.

**Investigations:** Congress is likely to investigate – with varying degrees of intensity and duration – many of the following topics, with implications for private companies, in the 110th Congress.

- Iraq reconstruction contracts, administrative cost overruns, and waste and fraud.
- Warrantless wiretapping by telephone and Internet companies at the direction of the government.
- Waste, fraud and no-bid contracts, and Department of Homeland Security contract management.
- Waste and fraud in Katrina relief funds, and FEMA contract management.
- Oil company profits, energy independence, and energy royalty relief.
- Oversight of the hedge fund industry.
- Allegedly politicized decision-making in drug policy.
- Drug safety, and the FDA's oversight of drug companies.
- Drug company profits and the Medicare prescription drug program.
- Private sector involvement in Bush Administration policymaking, such as on the Vice President's energy task force.
- Executive compensation and backdated stock options.
- Lobbying and corruption related to Jack Abramoff.
- The National Institutes of Health's human subject protections and alleged conflicts of interest.
- Large industry consolidation, and general antitrust oversight.

The investigative agenda of each Committee will also be driven by the respective interests of the incoming chairmen. In the House, presumptive Speaker Pelosi has indicated that she would like to channel general oversight through Congressman Waxman's Committee on Government Reform, but there may be tension between the chairmen and the leadership on the scope and extent of investigations. Each chairman will certainly retain some leeway to investigate specific areas of interest.

For more information on congressional investigations in the new Congress, please contact **Lanny Breuer** at [lbreuer@cov.com](mailto:lbreuer@cov.com) or by phone at 202.662.5538.

## **Drug Issues**

The prescription drug user fee, pediatric exclusivity, and mandatory pediatric study ("pediatric rule") provisions of the FDCA expire in the fall of 2007 and will therefore be the subject of reauthorization bills early in the 110th Congress. It is conceivable that all three will be combined into one bill, but whether combined or separate, these will be the subject of legislation and considerable debate by summer. These bills may also be viewed, by Democrats and Republicans alike, as potential vehicles for additional amendments to the FDCA. The issues that might be addressed in those amendments could also be the subject of freestanding bills in the 110th Congress. Many were the subject of bills in the 109th Congress, often with modest bipartisan support.

While user fee reauthorization is unlikely to be controversial in itself, pediatric exclusivity and rule reauthorization will prompt debate. A number of Democrats, including Senator Stabenow and Representative Waxman, support significant changes to the pediatric provisions. Changes that

are likely to be controversial include shortening the pediatric exclusivity term, permitting it to be awarded only if the study results in drug labeling changes, and awarding it only for the studied pediatric formulation. Senator Lott co-sponsored Senator Stabenow's pediatric exclusivity reform bill in the 109th Congress, but significant changes to pediatric exclusivity are likely to be championed primarily by the Democrats. Some of the same Members are likely to press for additional change to the Hatch-Waxman (generic drug approval) provisions of the FDCA, which were amended in 2003 as part of the Medicare prescription drug benefit law. There is continued interest, for example, in forcing prescription drug patent owners to initiate patent infringement litigation before generic drug entry, and in providing some sort of vehicle for generic drug manufacturers to initiate suit to resolve patent issues if the patent owner chooses not to do so.

Drug safety is likely to be addressed in the 110th Congress, either as part of PDUFA/pediatric reauthorization or in freestanding legislation. Several bipartisan bills were introduced in the 109th Congress to address perceived weaknesses in agency authority with respect to prescription drug safety. Some of the specific proposals under consideration – which include the authority to mandate risk management programs, the authority to dictate drug labeling changes, and the authority to mandate additional clinical trials after new drug approval – will likely gain traction with Democrats in control of the House. We are also likely to see bipartisan proposals to require the public registration of ongoing clinical trials and the public posting of clinical trial results.

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Two issues – prescription drug importation and conflicts of interest on FDA advisory committees – have been the subject of repeated debate in recent years and were the subject of riders to appropriations legislation for fiscal year 2007. Legislation to authorize personal and commercial importation of prescription drugs at least from Canada and possibly from other countries will likely be introduced by Democrats in the 110th Congress and, if introduced, will be the subject of vigorous debate. There will likely also be legislation proposed to revise either the FDCA or Title 18, to preclude FDA from obtaining the advisory services of scientists who have relationships with regulated industry. It is also possible that Representative Waxman and other Democrats will seek to respond in some fashion to FDA's statement in the January 2006 Federal Register that agency approval of prescription drug package inserts preempts certain state law claims under conflict preemption principles.

The issue of follow-on biologics (*i.e.*, creation of a pathway for approval of biological products that are similar to already-approved products for which the patents have expired) is also likely to be the subject of considerable debate in the 110th Congress. Mr. Waxman introduced a bill at the end of the 109th Congress to authorize FDA to approve follow-on biologics. Senator Clinton introduced its counterpart in the Senate. These bills are likely to be re-introduced in the 110th Congress, and others – including some Republicans – are apparently working on similar legislation. Due to the complexity of this issue, like the Hatch-Waxman Act, follow-on biologics may require several years of discussion before a legislative solution is reached.

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## Energy

Historically, energy issues have been primarily regional issues rather than partisan issues, but sometimes with a partisan edge. The question is whether the new majority of Democrats will seek to find common ground with Republicans on important energy policy issues or instead lay out a more hard-edged energy agenda with an eye toward the 2008 Presidential election. Most likely, we will see some of both.

For example, the Democrats "Six for 6" agenda prominently mentions "energy independence and lower gasoline prices" as one of its key goals. These issues are politically popular with both parties. After the election, President Bush said that he hopes to "build upon the recent progress we've made in addressing our energy dependence by aggressively pursuing new technologies to break our addiction to foreign sources of energy." Congressman John Dingell, who will become Chairman of the Energy and Commerce Committee, said yesterday that he wants to reduce dependence on foreign oil by addressing technology, conservation, vehicle efficiency and the use of alternative fuels.

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So, at the 30,000 foot level, Democrats and Republicans are using some of the same rhetoric, but the extraordinary challenge is how to find common ground on concrete legislation. Senator Jeff Bingaman, who will likely be the Chairman of the Senate Committee on Energy and Natural Resources, and Senator Pete Domenici, the likely Ranking Member, have a tradition of working together on a number of key issues.

The first test on implementing an energy independence agenda may be whether there is any bi-partisan deal to be had on Outer Continental Shelf leasing legislation. Key Democrats in the Senate, including Louisiana Senator Mary Landrieu and Senator Harry Reid, who will be the new Majority Leader, have said that they want to expand offshore oil and gas drilling before adjournment this year. A possible deal could center around the bill the Senate has already passed that would open new areas in the Gulf of Mexico, but not elsewhere. Ms. Pelosi is said to be comfortable with such an approach as well, but Senator Bingaman and others have strong concerns about how the leasing revenues would be allocated.

Beyond the lame duck session, key Democrats have said that a priority will be eliminating oil company tax breaks, and directing the tax revenues toward renewables and various other energy independence initiatives. But the Democrats may have a difficult time finding enough Republican votes to limit oil company tax breaks. There may very well be opportunities, however, to pass bi-partisan legislation in the areas of energy efficiency and alternative fuels, both key components of energy independence, although any changes to vehicle fuel economy standards will have to pass the skeptical eye of Mr. Dingell. In contrast, promoting bio-fuels seems to have strong support on both sides of the aisle.

Energy independence requires a thoughtful focus on our abundant coal resources, and this may be one of the areas where new energy technologies could have a significant impact. Congressman Rick Boucher of Virginia is expected to become Chairman of the Subcommittee on Energy and Air Quality. He will champion clean coal technology programs, as will Senator Robert C. Byrd of West Virginia, the likely Chairman of the Senate Appropriations Committee. Boucher is also a strong supporter of coal to liquids technology that would turn coal into transportation fuels. And, of course, the clean IGCC technology for electric generation from coal may very well get a

boost in the new Congress. Members will be looking for ways to boost energy independence without adverse environmental effects.

With regard to coal, no serious discussion of energy issues would be complete without mentioning the 800-pound gorilla, climate change, which will get a much greater focus now. Senator Bingaman authored the Sense of the Senate resolution that passed in 2005 calling for mandatory, market-based limits on greenhouse gas emissions that will not significantly harm the U.S. economy. Senator Bingaman and Senator Barbara Boxer of California, likely to become Chair of the Committee on Environment and Public Works, will ensure that climate change is given significant attention. Republican help may very well come from Senator John McCain, who has been very active in the climate change debate. Senators may also get support from Congressman Henry Waxman, the presumptive Chairman of the House Government Reform Committee, who is said to have climate change on his rather large oversight agenda for the new Congress. But again, Congressman Dingell will have a big role in this debate, and he is more skeptical of workable solutions. On this complex issue, the prospect of moving concrete legislation during this Congress is likely to be illusory.

Three more energy-related issues are worthy of note.

**Nuclear policy** – the focus on energy independence and carbon reduction should be a boost for nuclear power. Congressman Dingell is a strong supporter. The challenge is the Yucca Mountain stalemate with Senator Reid, who will be in an even more prominent position to set policy.

**Energy oversight** – since the election, Congressman Waxman has mentioned the Cheney task force and other energy issues such as commodity trading, energy price gouging, and market manipulation, as possible targets for oversight. He and Congressman Dingell both will likely focus some oversight attention on the energy industry and on energy policy.

**Electricity policy** – there will surely be a focus on legislation to promote efficiency, conservation and renewables in the electricity industry. Senator Bingaman is a prominent supporter of the Renewable Portfolio Concept for electric generation. With respect to competition policy, Energy Policy Act of 2005 affirmed that electricity competition remains the national policy for wholesale markets. In light of this, much of the legislative debate on electricity competition policy may shift to the states and retail markets, particularly with the election of Martin O'Malley as Maryland's Governor, and Elliott Spitzer in New York. These two states, plus Illinois, may remain very focused on electricity competition policy in the coming year.

For more information on energy issues in the new Congress, please contact **William Massey** at [wmassey@cov.com](mailto:wmassey@cov.com) or by phone at 202.662.5322.

## **Food and Agriculture**

A change in control of the House means that Collin Peterson, a 16-year veteran of the House from Minnesota, will likely become Chairman of the Agriculture Committee. Peterson has recently noted that he would like to continue the Agriculture Committee's bipartisan approach when it reviews reauthorization of the massive Farm Bill next year. While Peterson has not been particularly active on the issue of organic foods, other Democrats, such as Deputy Whip Ron Kind of Wisconsin, likely will push aggressively for larger inclusion of organic foods in the Farm Bill through programs providing "green payments" and other incentives to farmers to produce organic crops and other incentives. Given the pent-up demands within the agriculture community at large, there is every reason to believe that the Agriculture Committee led by Mr. Peterson will produce a Farm Bill next session.

In a Democratically-controlled Senate, both USDA and FDA can expect increased scrutiny, under Tom Harkin of Iowa, likely chair the Agriculture Committee, and Edward Kennedy of Massachusetts, likely chair the Health, Education, Labor and Pension Committee. Both senior

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Democrats have supported stronger food safety authority for USDA and FDA. The reauthorization of the Farm Bill would provide Harkin a vehicle for pushing many of his key issues such as expanding conservation programs, making dietary supplements available through the Food Stamp

program, reducing childhood obesity, and increasing use of ethanol. Harkin is up for reelection in 2008 and given the strong farm constituency in Iowa, Harkin would likely work hard to produce a Farm Bill.

Patrick Leahy of Vermont will be poised again to chair the Senate Judiciary Committee. Leahy is also a senior member of the Agriculture Committee. He is a strong supporter of organics, and will be a key player in reauthorization of the Farm Bill.

New leadership on the House Energy and Commerce and Government Reform Committees will also have a significant impact on the food industry. Representative Dingell of Michigan is slated to once again become Chairman of the powerful Energy and Commerce Committee, which controls significant food-related legislation, including the National Uniformity for Food Act of 2005. Mr. Dingell opposed this legislation passed by the House earlier this year. He may hold hearings on FDA food regulatory policy issues that have been longstanding areas of interest to him, such as the premarket clearance systems for food ingredients (e.g., generally recognized as safe ("GRAS") substances and color additives).

Jan Schakowsky of Illinois will likely become Chair of the Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection, which has jurisdiction over the Federal Trade Commission, consumer affairs, product liability and consumer protection. Schakowsky has been an aggressive supporter of food safety reforms. She is an original co-sponsor of legislation seeking to establish a single food safety agency. While this legislation is unlikely to be enacted, Schakowsky will probably hold numerous hearings on food safety related issues. Since she has not co-sponsored legislation providing the FTC with authority to regulate advertising to children, the big question is whether Schakowsky will delve into this issue in the next Congress.

Representative Waxman of California is expected to become Chairman of the Government Reform Committee. This change will likely result in oversight hearings critical of existing regulation of dietary supplements. These hearings may motivate the House to act on legislation requiring adverse event reporting for dietary supplements. (Senators Harkin (D-IA) and Hatch (R-UT) have introduced similar legislation in the Senate.)

Late last year, the House passed the Personal Responsibility in Food Consumption Act. The Senate has yet to act on the legislation. Although it has bipartisan support, John Conyers of Michigan, the next Chairman of the Judiciary Committee, which has jurisdiction over the bill, has voted against the legislation.

With respect to Appropriations, the biggest impact on the House Appropriations Committee will be a change in the Chairmanship from Jerry Lewis of California to David Obey of Wisconsin. While overall domestic discretionary spending will likely receive a modest increase, targeted funding for special member projects will most certainly decrease. Rosa DeLauro of Connecticut will likely become Chair of the Agriculture Appropriations subcommittee, which has jurisdiction of

USDA and FDA funding. Like Schakowsky, DeLauro has been a longtime advocate for legislation establishing a single food safety agency. She is also a strong supporter of increasing FDA funding.

In the Senate, Robert Byrd of West Virginia will once again become chair of the Senate Appropriations Committee; and Herb Kohl of Wisconsin likely will become chair of the Agriculture Appropriations subcommittee. Kohl is a Midwestern progressive and likely will support efforts to increase USDA and FDA funding.

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## Health

In a Democratically-controlled House, some of the more liberal members of the Democratic party will be at the helm of Committees and Subcommittees with jurisdiction over health care-related issues. Moreover, these Members are unlikely to cede control over their issue areas to the Democratic Leadership, which occurred more frequently in the Republican-controlled House. In that regard, Representative John Dingell, who will chair the House Energy and Commerce Committee has been in the House for more than 50 years, and chaired the Energy and Commerce Committee from 1981 until the Republicans took control in 1994.

The chairmanship of the Health Subcommittee is less clear. Under current House rules (which are Republican caucus rules), Henry Waxman would not be able to Chair the Energy and Commerce Subcommittee on Health and the full Government Reform Committee without a formal waiver. The Democratic caucus, however, may pass different rules, and in that case, it will be a question of whether Waxman wants to lead both the health subcommittee, which he chaired from 1979 to 1994, and the Government Reform Committee. Waxman is next in line in seniority, since Sherrod Brown resigned his House seat to run successfully for the Senate. Representative Waxman and Dingell are considered pro-consumer and pro-beneficiary, and often have been at odds with corporations -- whether pharmaceutical companies or insurance companies -- and the states that run the major federal health programs, such as Medicaid and SCHIP programs. They clearly will continue to vigorously oppose the Administration's health care-related budget proposals, which they have done in their minority role since 2000. Because of budget constraints, it would be difficult to rollback some of the Administration's policies they have opposed, such as benefits to health maintenance organizations, or cuts in long-term care services to the elderly. But they will likely make the effort in the next Congress.

Similarly, Representative Stark, who served as Chair of the Ways and Means Health Subcommittee from 1985 through 1994, will take over again as Chair. He is likely to have more power than his predecessor did under former Ways and Means Committee Chairman Thomas, who was personally involved in all of the committee's health care-related agenda.

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legislation to repeal the provision in the Medicare Part D prescription drug program that does not permit the Secretary of the Department of Health and Human Services to negotiate drug prices with pharmaceutical companies. Many view this non-interference provision as fundamental to the consumer-choice private-market mechanism established for Medicare Part D, and a vigorous debate can be expected. Chief among the opponents of this provision is Senator Max Baucus, who will assume the chairmanship of the Finance Committee, in a Democratically-controlled Senate. He has indicated that he believes it is too early in the life of the program to change the non-interference provision. He was one of two Democrats (Nelson of Nebraska was the other) who opposed a Snowe amendment to the Deficit Reduction Act that would have allowed HHS to negotiate drug prices on behalf of Medicare beneficiaries. While the amendment had Republican support, Baucus' opposition could be a critical roadblock to the House Democrat's plans to push this legislation early in the next Congress.

A second piece of health care legislation that will be substantially revised in the new Congress relates to health Information Technology (IT). While the House and Senate have passed versions of health IT legislation, it passed in the House without much Democratic support. The Democrats want to strengthen the privacy protections and require a timeline for the implementation of interoperability standards. Both the Ways and Means and Energy and Commerce Committees are expected to go back to the drawing boards on this key health legislation.

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## International Trade

Few issue areas will be affected more by the change in control of the House than international trade. Charles Rangel, a 36-year veteran of the House from New York, takes the helm as Chairman of the powerful Ways & Means Committee. Rangel is not reflexively anti-trade. The important Ways & Means Subcommittee on International Trade will be led by either Sandy Levin, a 24-year veteran from suburban Detroit, or John Tanner, a Democrat from Tennessee. Both Rangel and Levin have supported some trade agreements, including the Uruguay Round Agreement in 1994 and free trade agreements with Singapore, Australia, and Chile, but opposed other agreements, including NAFTA, CAFTA, and the renewal of Trade Promotion Authority in 2001. Rangel has been a strong supporter of preferential trade programs for developing countries, including the Caribbean Basin Initiative, the Generalized System of Preferences, and the African Growth and Opportunity Act. Levin has been a long-time advocate on behalf of the manufacturing sector, including the auto industry, dating back to the late 1980s, and early 1990s disputes with Japan over auto parts. Tanner has been a stronger supporter of trade liberalization and voted for CAFTA. Rangel, Tanner and Levin can be expected to take a tough line on trade with China. Rangel will likely cooperate with the Administration to try to secure a Trade Promotion Authority bill but will insist on much stronger labor and environmental provisions.

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Max Baucus of Montana takes over the powerful Senate Finance Committee, the committee with jurisdiction over trade. Baucus has been a strong supporter of international trade and has important constituencies, including agriculture, that rely on open markets. Baucus will likely be much more assertive in oversight of the Administration's trade agenda than Senator Charles Grassley, the current Chairman of the Finance Committee. Baucus has been critical of the Bush

Administration's trade agenda. Baucus and other Senate Democrats may push for a broad-based competitiveness bill along the lines of the 1988 Omnibus Trade and Competitiveness Act. Such a bill might include Trade Promotion Authority, trade adjustment assistance, GSP and labor and environmental provisions.

In terms of the trade agenda for the 110th Congress, the most significant question will be whether Trade Promotion Authority, which expires on June 30, 2007, will be renewed. When TPA was last considered by Congress, it passed the House by one vote with only 21 Democrats supporting the bill. Trade Promotion Authority is necessary for the President to complete trade negotiations and submit them to Congress for approval on an up-or-down basis. Without TPA, no country will negotiate with the United States either in a bilateral or multilateral context. We believe the odds are that TPA will not be renewed in the 110th Congress for a number of reasons. First, substantial differences remain between Democrats and Republicans over labor and environmental issues. Second, it is unclear whether the President would pursue the type of full-court press campaign that would be required for passage of TPA. Third, House Democrats may not want to give the President a victory on TPA or other trade agreements leading up to the Presidential election in 2008. Democrats are more favorably disposed to multilateral agreements than bilateral agreements; thus, if the Doha Round negotiations under the WTO pick up steam, Democrats might be favorably disposed to a WTO-only TPA bill. Further, if the White House and business community are flexible on labor and environmental issues, the odds of a TPA bill will increase.

There are a number of important trade agreements in the pipeline. The Free Trade Agreements with Panama, Columbia, and Peru have been negotiated, but not approved by Congress. USTR is intensively negotiating with Malaysia and Korea with the hope of completing those agreements by early spring so they can be considered by Congress before TPA expires next June. Democrats, particularly in the House, have opposed trade agreements with developing countries in Latin America. A majority of House Democrats voted against NAFTA and all but a dozen Democrats voted against CAFTA. Thus, we would suspect that the agreements with Panama, Columbia, and Peru would face uncertain prospects, at best, in the 110th Congress. Republicans in Congress may try to force a vote on the Peru FTA during the lame-duck session of Congress in mid-November.

Since Korea is a high-wage country and a very large economy, and Malaysia has strategic importance as a major trading partner and a moderate, Islamic country, there could be broad, bipartisan support in the Congress for the US-Malaysia and US-Korea FTAs if the United States can reach agreement with those countries. Because Congressman Levin, a strong supporter of the auto industry, will likely chair the trade subcommittee in the House, the fate of the US-Korea FTA will depend in large part on whether Korea makes sufficient concessions in the auto sector to satisfy Mr. Levin.

Finally, a number of preferential trade programs expire this year, including GSP, and the Trade Adjustment Assistance Program expires in 2007. We believe there will be strong support in the House for renewal of these programs. Ironically, support for GSP is mixed in the Senate, particularly from Senator Charles Grassley of Iowa, who will be the ranking Minority Member of the Senate Finance Committee.

For more information on international trade issues in the new Congress, please contact **David Marchick** at [dmarchick@cov.com](mailto:dmarchick@cov.com) or by phone at 202.662.5527.

## Judiciary

The House Judiciary Committee has traditionally been one of the most partisan committees in Congress. With the ascent of Representative John Conyers (D-MI) to the Chairmanship, this tradition is unlikely to change. Representative James Sensenbrenner (R-WI) will become the Ranking Minority Member. Under House Republican Conference rules, Sensenbrenner would have had to relinquish the top spot on Judiciary had the Republicans retained the majority. Current Conference rules would permit him to serve in the senior minority position.

Representative Conyers can be expected to pursue an aggressive oversight agenda and his committee will be a frequent venue for Bush Administration witnesses. Conyers is an outspoken critic of the Administration. No member of the House is more associated with talk of bringing impeachment proceedings against President Bush. While Representative Nancy Pelosi has stated publicly that impeachment is "off the table", Conyers will work hard to develop a record that, at a minimum, is intended to cast the Administration in a bad light.

Among the areas likely to receive attention is the Administration's conduct of the War on Terror as well as the war in Iraq. For example, Conyers has vociferously complained about the warrantless surveillance program, an issue that was left unaddressed by the current Congress. The detainees program is likely to be scrutinized. Conyers has also been dissatisfied with the Patriot Act and may seek to reopen it.

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With rare exceptions, the Senate proved to be the graveyard for tort reform legislation over the last decade, notwithstanding a vigorous push from House Republicans. Under Chairman Conyers, such legislation is unlikely to get much oxygen. Moreover, Senate Judiciary Committee Chair Patrick Leahy is also unlikely to consider any such legislation favorably.

Conyers may take greater interest in brandishing the weapon of antitrust oversight against certain industries. For example, in the past he had expressed concern about gasoline pricing. So if energy costs were again to rise, Conyers could get active. Other industries, such as pharmaceuticals, may also get attention.

An ongoing topic of interest for Conyers is voting reform. For instance, Conyers has produced reports claiming that voting breakdowns occurred in Ohio in 2004 and that Senator Kerry rather than President Bush should have won the state. One can anticipate that Conyers will be active on election reform matters.

Copyright reform will also receive committee attention in the new Congress as will the Judiciary Committee's piece of lobbying reform, which includes record-keeping requirements for lobbyists on each contact they have with Capitol Hill Members and staff. In addition, patent reform is much more likely to move out of committee in a Democratic Congress -- both the House and the Senate -- since the major opposition to reform has come from PhRMA, which is not a favored trade association among Democrats. Democrats have been making an effort to burnish their credentials with the hi-tech community, and pushing patent reform provides them with a prime opportunity to do just that. We expect the Berman bill and the Leahy (currently Hatch-Leahy) bill to become the respective House and Senate vehicles.

One area where the Committee and the Administration can work together is immigration reform. Conyers is likely to support immigration proposals that more closely track the President's position and that of the Senate. House Republicans, who had insisted on a harder line will be considerably less likely to influence immigration policy. With enactment of the Secure Fence Act in this Congress, proponents of a softer line on immigration will be able to claim that border security has been put first, and that may open the door to a deal on immigration in 2007.

Another area that could receive bicameral cooperation is eminent domain legislation. In response to the Supreme Court's Kelo decision last year, a number of states have considered or passed legislation that restricts the purposes for which private property may be taken by eminent domain. Legislation on that topic passed the House in the current Congress, but the Senate Judiciary Committee has not reported a bill. The effort could well be renewed next year, because the eminent domain bill was a prominent House Judiciary measure that Mr. Conyers supported.

In the Senate, under Chairman Patrick Leahy, the Judiciary Committee may press forward on contracting reform, net neutrality, and reform of the criminal laws, in addition to the issues discussed above. Further, in Democratic hands, the Committee would be a forum for active Executive branch oversight.

As has become customary in the Senate, judges will be highly controversial. With Republican control there would have been a prospect of return to judicial filibusters, which was addressed only temporarily during the 109th Congress. Under Democratic control, there will be no need to filibuster because the Committee will not report nominees unacceptable to the Chairman and there is no effective mechanism that would cause the Committee to be discharged.

For more issues on Judiciary committee issues in the new Congress, please contact **Martin Gold** at [mgold@cov.com](mailto:mgold@cov.com) or by phone at 202.662.5405.

## **Taxation**

In the House, there will be a profound shift, both in substance and in style, with the transition from outgoing Chairman Bill Thomas to incoming Chairman Charles Rangel. Rangel has pledged to introduce greater civility and bipartisanship into the Committee. How successful Rangel will be in working in a bipartisan manner remains to be seen. We expect he will stack the Committee with extra Democrats just as his predecessor Chairmen of both parties have done. Nevertheless, it is likely both Democrat and Republican Committee Members may have more input into the process than they have had in this Congress.

A change of control will be less dramatic in the Senate Finance Committee. Senators Grassley and Baucus have always maintained a good relationship and the power of the minority will enable Republicans to block most legislation that they universally oppose. Nevertheless, there will be a clear change of emphasis from tax cuts to tax compliance. Senator Baucus is a zealot on closing the tax gap and less interested than Senator Grassley on charity reforms.

Contrary to the predictions of some, Chairman Rangel and the Senate Democrats will not attempt a frontal assault on the Bush tax cuts (rates, capital gains, etc.) in the next Congress. Democrats are mindful of avoiding the "tax-increaser" label as the party angles to capture the White House in 2008. On the other hand, we expect to see no extension of Bush tax cuts and we may see some backdoor chipping away at these cuts to pay for other priorities.

Clearly, this control change will end any prospect of permanently repealing the estate tax. There will be a need to find some reform on the estate tax, however, before the end of 2009 when repeal kicks in for one year. The House Democrats have several times proposed a \$3.5 million estate tax exemption with a 50% top rate. It is likely that a 45% top rate (the rate that will be applicable in 2009) would be acceptable to them as well. There is a strong need for a number of moderate Democrats (including Senator Baucus) to get some estate tax reform enacted before the 2008 election.

Repeal or overhaul of the Alternative Minimum Tax ("AMT") will be a top agenda item for the Democrats. The present smaller fix for the AMT enacted as part of the Bush tax package expires in the coming year. It has been estimated that by 2010, about half of taxpayers in the \$75,000 to \$100,000 income range will be paying the AMT (89% of taxpayers with two or more children in that income range). The AMT hits New York residents especially hard because of the higher state tax deductions.

Repeal of the AMT will cost \$1.3 trillion over 10 years. Since we are entering into a period in which revenue offsets will be expected to cover any new cuts, this may expose the business community to a wave of new "loophole closer" tax increases. Perhaps the easiest place to start will be attacking the \$345 billion per year "tax gap." The Joint Committee on Taxation has suggested a number of third-party reporting measures. For example, they propose basis reporting by brokers that would reduce the \$11 billion in annual individual underreporting of capital gains.

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There may be specific industry targets of loophole closers such as the oil, pharmaceutical or insurance industries. During the campaign, there was a steady stream of rhetoric about oil company loopholes and several Senate-passed oil company provisions were blocked in conference by Chairman Thomas. One should expect some effort to revive the proposal for an oil windfalls profit tax. There may be an effort to look at foreign tax provisions that are perceived as promoting outsourcing of jobs.

There are other revenue-raisers that have repeatedly passed the Senate only to be blocked by Chairman Thomas that might have new life. One such item is the codification of the "economic substance" doctrine, a provision that has raised concern in the tax bar and at Treasury.

Ironically, in this new environment Treasury and the Administration may have more clout. Many Treasury-suggested loophole closers that might have been ignored by Chairman Thomas will fall on fertile ground in the new Congress with the need for revenue offsets. In addition, the Administration will be more aggressive in making veto threats if tax increases are advanced that the Administration strongly opposes.

For more information on tax issues in the new Congress, please contact **Roderick A. DeArment** at [rdearment@cov.com](mailto:rdearment@cov.com) or by phone at 202.662.5900.

## **Transportation**

The House Committee on Transportation and Infrastructure will undergo significant changes when Jim Oberstar (D-MN) takes the reins from outgoing Chairman Don Young (R-AK). Oberstar, a former transportation committee staffer, is the consummate insider--a career

legislator with a deep and abiding interest in transportation, especially aviation. He will likely be more bipartisan and more inclusive than his predecessor.

Oberstar prides himself on being the foremost congressional authority on aviation. We expect him to be an activist chairman, especially when it comes to aviation matters. And with FAA programs up for reauthorization in 2007, he will have the perfect vehicle to accomplish his objectives. One of the critical issues will be whether to convert aviation financing from the current aviation tax system to cost-based user fees, as the Administration and commercial passenger airlines would like to do. Oberstar is far more skeptical of shifting to user fees than his Republican predecessors. As a result, the chances of it happening in the next reauthorization bill are greatly reduced.

Under an Oberstar chairmanship, it is much less likely that the Administration will be successful in its efforts to allow increased foreign ownership in U.S. airlines. He views the DOT proposal as “trading away the crown jewel of American transportation--our nation’s airlines--at their most vulnerable moment, to their foreign competitors.” We anticipate that Oberstar will be unrelenting on this issue.

One of Oberstar’s earliest challenges could come in the first few months if there is a national rail strike, which now appears likely. Congress typically intervenes in these disputes by passing legislation setting up a process to resolve the dispute. Time is of the essence because of the dire impact of a national rail strike on the economy. However, labor will be pushing Oberstar hard to let the strike go on for a while and to settle it on terms favorable to labor. He will have to be very careful in how he handles this issue. He will not want to go so far that he can be accused of pandering to labor. There will be pressure on Democrats to “act responsibly”.

Another early challenge will involve the budget. When Republicans were in charge, transportation programs--especially highways and transit--were funded at their fully authorized levels, in large measure because of the funding guarantees Republicans put in place for trust fund financed programs. Oberstar will be under tremendous pressure to continue this practice, but it may be difficult. Democrats will want to increase funding for many social programs that they feel were shortchanged in recent years. This will put the squeeze on many other programs such as transportation. This could be a big test for Oberstar.

*Oberstar, a former transportation committee staffer, is the consummate insider--a career legislator with a deep and abiding interest in transportation, especially aviation.*

We also expect Oberstar to be more active on rail issues than the Republicans had been in previous years. In the 109th Congress, Oberstar was the lead sponsor of the Railroad Competition Improvement and Reauthorization Act. This legislation--which did not become law--would have provided relief for captive shippers from the high rates and poor service they allegedly receive from railroads. This legislation will be extremely controversial as the railroads consider it tantamount to re-regulation.

Also Oberstar is expected to carefully monitor Administration activities to promote public and private toll roads as the solution to the nation’s infrastructure investment crisis. He is a skeptic in this area and will almost certainly take action to block the Administration’s efforts if he feels they go beyond what is permitted in SAFETEA-LU.

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In the new Democratically-controlled Senate, Senator Inouye from Hawaii will be the Chairman of the Senate Commerce Committee, which has jurisdiction over transportation matters. With respect to transportation, the Committee is expected to continue its bipartisan tradition, as transportation issues are generally more regional than partisan. Senator Inouye and Senator Stevens, the outgoing Chairman, have worked closely together on Committee issues in the past and are expected to continue in that vein.

Several transportation issues will be of interest to both Democrats and Republicans on the Committee in the new Congress. Reauthorization of the Federal Aviation Administration will be a high priority. Funding will be an issue, and there is expected to be extensive debate within the Committee about the merit of user fees as an alternative funding mechanism. Aviation safety will also be a key issue of focus. The Committee has been active in the area of aviation safety in the past, and recent runway incidents in particular will reinforce that interest.

Rail issues also will be a Committee focus, even though Senator Inouye has no direct constituent interest. Amtrak will be a front-and-center issue. Several Democrats, along with certain Republicans, are committed to retaining a national rail passenger system and to legislating a long-term plan to that end. Regarding freight rail issues, legislation to reform the way the freight railroads are economically regulated is expected to receive attention, given the keen interest of certain Democrats in this issue.

Other issues will garner the attention of the Committee, including legislation to provide for a freight rail investment tax credit, the possibility of a national rail labor strike, highway infrastructure funding and how passenger rail might be incorporated into that debate, transportation safety and security issues across all modes, and Corporate Average Fuel Efficiency standards.

For more information on transportation issues in the new Congress, please contact **Jack Schenendorf** at [jschenendorf@cov.com](mailto:jschenendorf@cov.com) or by phone at 202.662.5321; or **Linda Morgan** at [lmorgan@cov.com](mailto:lmorgan@cov.com) or by phone at 202.662.5214.

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