



Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE FROM: Betsy Shotwell

SUBJECT: SEE BELOW

DATE: November 1, 2011

Approved

Date

11/3/11

SUBJECT: STATUS AND FORECAST OF NOTABLE FEDERAL LEGISLATION RELEVANT TO LOCAL GOVERNMENT INTERESTS

RECOMMENDATION

Acceptance of the attached status report from the City's Federal advocacy firm of Patton Boggs, LLP, in Washington, D.C.

OUTCOME

That the Rules and Open Government Committee and the City Council have the opportunity to review the status report by Patton Boggs staff on pending federal legislation in Washington, D.C. during the first session of the 112th Congress in 2011.

BACKGROUND

As Congress returns from recess this week, Patton Boggs is providing the attached update on the status and prospects of pending federal legislation of particular relevance and interest to local governments. This activity supports the City's advocacy and education in promoting our federal legislative priorities.

ANALYSIS

The attached report describes in detail the status of high-profile federal legislation of interest to the City. The report references the status of the FY 2012 appropriations and budget with the most recent Continuing Resolution to fund the Federal government set to expire on November 18. The report also provides details on the status of the "Joint Select Committee on Deficit Reduction" (aka the "Super Committee"), which is charged to produce legislation by November 23 that reduces the deficit by \$1.2 to \$1.5 trillion over 10 years (to offset the final debt ceiling increase installment). "Super Committee" updates are also covered in Patton Boggs' weekly "Capital Thinking" reports found on their website, www.pattonboggs.com.

Rules and Open Government Committee

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The report also covers the status of the proposed jobs agendas, the Federal Aviation Administration and SAFETEA-LU reauthorizations, climate change/energy legislation, water resources, telecommunications, including public safety interoperability/D Block spectrum allocation, tax reform, and a number of bills on other priority topics. This Congressional report provides the prospects of pending legislation in the remaining months of 2011.

PUBLIC OUTREACH

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

By providing this document to the Rules and Open Government Committee in November, this document will be posted on the City's website with the November 9 meeting agenda and interested public will have the opportunity to review the document prior to the full Council acceptance.

COORDINATION

This memo was coordinated with the City's Washington, D.C. lobbyist firm of Patton Boggs, LLP.



BETSY SHOTWELL

Director, Intergovernmental Relations

Attachment: Patton Boggs, LLP memorandum, "Status and Forecast of Notable Federal Legislation Relevant to Local Government Interests"

For more information contact: Betsy Shotwell, Director of Intergovernmental Relations at (408) 535-8270.

MEMORANDUM

To: City of San Jose
From: Patton Boggs LLP
Date: October 28, 2011
Subject: Status and Forecast of Notable Federal Legislation Relevant to Local Government Interests

This memorandum provides a comprehensive update on the status and prospects of pending, high-profile federal legislation of particular relevance to local governments. Specifically, the memo addresses --

- FY2012 Budget and Appropriations
- Joint Select Committee on Deficit Reduction
- House Resolution of Disapproval Regarding Debt Limit Increase
- Balanced Budget Amendment
- Proposed Jobs Agendas
- Transportation / SAFETEA-LU Reauthorization
- Federal Aviation Administration Reauthorization
- Home Affordable Refinance Program Changes
- Chemical Security
- Climate / Energy Legislation
- Water Resources and Water Quality
- Flood Insurance Reform
- Telecommunications
- Municipal Bonds
- Legislation to Repeal the Three Percent IRS Withholding Provision

FY2012 BUDGET AND APPROPRIATIONS

Following enactment of the Budget Control Act (P.L. 112-25), which established an overall discretionary spending cap of \$1.043 trillion for FY2012, there was a significant amount of Senate Appropriations Committee action in September, resulting in full committee approval of all but one FY2012 appropriations bill (Interior-Environment) for which the subcommittee released draft text in October. The Senate has passed only one FY2012 appropriations bill thus far, the Military Construction-Veterans Affairs bill (H.R. 2055). Additionally, the House Transportation-Housing and Urban Development Appropriations Subcommittee approved its FY2012 spending bill on September 8 and the full House Appropriations Committee subsequently released draft report language for the Transportation-Housing, Labor-HHS-Education, and State-Foreign Operations bills (all of the remaining House bills have already been reported out of the full Committee and six have been approved by the full Chamber).

Despite the flurry of activity in both Chambers, the efforts did not produce any completed FY2012 spending bills prior to the start of the Fiscal Year on October 1 and the first FY2012 Continuing Resolution (CR) was enacted on September 30 (P.L. 112-33). This weeklong CR funded the federal government through October 4 and enabled Congressional leaders to finalize another short-term CR which was enacted on October 5 and funds the government through November 18 (P.L. 112-36). The CR utilizes the discretionary spending cap of \$1.043 trillion established in the Budget Control Act, which results in a 1.409 percent overall reduction from FY2011 discretionary spending.

With time running short and limited support for a large omnibus bill including all twelve appropriations bills, the Senate has now shifted its approach to address the appropriations bills through the creation of "minibuses," or multiple packages of a couple/few regular appropriations bills. The first "minibus" appropriations bill includes the Agriculture, Commerce-Justice-Science, and Transportation-Housing and Urban Development bills (H.R. 2112) and was brought to the Senate floor on October 17. During the weeklong debate, hundreds of amendments were filed and dozens were considered. Two of the amendments approved increase disaster funding - \$110 million for the Department of Agriculture, proposed by Senator Kirsten Gillibrand (D-NY) and \$365 million for the Economic Development Administration, proposed by Senator Frank Lautenberg (D-NJ). The Senate did not vote on a final package before adjourning for a weeklong recess, but Senate leaders did reach an agreement on the pending amendments, which leaves them poised to vote on the remaining amendments and pass the bill when they return from recess on November 1.

Appropriators concede they will not complete their FY2012 appropriations work prior to the expiration of the current Continuing Resolution (CR) (P.L. 112-36) on November 18; therefore, an additional CR, possibly running through late December, will be added to the bill. As the House has already passed the Agriculture bill (the primary vehicle for the minibus), the measure will go directly to a House / Senate conference when approved by the Senate and will not be subject to additional floor amendments in the House. However, House Appropriations Chairman Harold Rogers (R-KY) is considering adding one or two additional appropriations bills to the minibus to expedite resolution of the FY2012 process (potential bills for inclusion were not identified).

The next minibus is expected to be introduced in the Senate on November 2 and reportedly will include the Energy and Water, Financial Services, and State-Foreign Operations bill.

While there are significant divides between the House and Senate over funding levels, the bigger sticking point in negotiations may be policy provisions proposed by House Republicans, particularly with regard to establishing spending limitations for the 2010 healthcare reform bill and changing Environmental Protection Agency regulations. House conservatives also oppose the use of the \$1.043 trillion spending cap established in the Budget Control Act in lieu of the lower cap of \$1.019 trillion set in the House Budget Resolution (H. Con. Res. 34).

JOINT SELECT COMMITTEE ON DEFICIT REDUCTION (“SUPER COMMITTEE”)

On September 7, the Committee named Sarah Kuehl as its Deputy Staff Director. Ms. Kuehl serves as a senior budget analyst for Senate Budget Committee Democrats, focusing on Medicare, health insurance and Social Security. She will work with Republican Mark Prater who was previously announced as the Committee Staff Director.

It is difficult to judge the progress of the Joint Select Committee on Deficit Reduction (JSC / Super Committee), tasked by the Budget Control Act of 2011 (P.L. 112-25) to cut \$1.2 trillion from the deficit and to gauge whether it will be able to meet the November 23rd deadline for submitting its recommendations for Congressional approval (because the proposal must be scored by the Congressional Budget Office, the deadline is actually closer to early November). Despite a pledge of transparency, the majority of Committee meetings have been private, although there have been reports of meetings between committee members, the Gang of Six, party leaders and their top aides. Some commentators speculate that the privacy of these meetings indicate the JSC is making no progress and remains stuck on the preliminary question of which avenues to take to reach its goal - discretionary cuts, entitlement reform, and / or tax revenue - while others sense the lack of interference and distractions are resulting in productive discussions.

In addition to the public organization meeting, the Committee held two public hearings in September: “The History and Drivers of Our Nation’s Debt and Its Threats” on September 13, in which Douglas Elmendorf, Director of the Congressional Budget Office testified; and “Overview: Revenue Options and Reforming the Tax Code” on September 22 in which Thomas Barthold, Chief of Staff, Joint Committee on Taxation, testified. A public hearing was also held on October 26: “Overview: Discretionary Outlays, Security and Non-Security”. Douglas Elmendorf also testified at this hearing. In conjunction with the hearing several Democrats and Republicans on the committee presented dueling proposals outlining methods to exceed the committee’s deficit reduction goals. The Committee’s next hearing will take place on November 1, and former Senator Alan Simpson (R-WY) and Erskine Bowles are scheduled to testify. Senator Simpson and Mr. Bowles co-chaired President Obama’s bipartisan National Commission on Fiscal Responsibility and Reform, which released a plan to cut \$4 trillion from the budget over the next 10 years.

Congressional committees were given a deadline of October 14 to submit recommendations to the Super Committee on methods to achieve a \$1.2 trillion deficit reduction. The Super Committee is not required to consider or incorporate these proposals into its final plan, but they serve to highlight

the priorities of the other Congressional committees. Not all committees submitted recommendations. Following are highlights from the proposals submitted by the Senate Budget and House Appropriations Committees:

House Appropriations Committee

Republican Appropriations Committee Members did not submit any public recommendations to the Super Committee. In his October 13th letter to the Super Committee, House Appropriations Ranking Democrat Congressman Norm Dicks (D-WA) reiterated Federal Reserve Chairman Ben Bernanke's message from October 4 testimony to Congress, specifically, that long-term budget reductions are required. While Ranking Member Dicks noted these cuts should be pursued to a greater extent than mandated in the Budget Control Act (P.L. 112-25), it is important to be cautious regarding short-term cuts so as not to impede economic growth. Ranking Member Dicks focused on the consequences of sequestration, the process that would occur in the event the Super Committee does not produce a deficit reduction plan or if Congress cannot pass whatever plan the Super Committee puts forth. Sequestration is essentially an "across the board" withholding of appropriations from every agency—although Congress has exempted some programs from such cuts.

Ranking Member Dicks focused on the specific consequences that sequestration would have to a range of programs. The following list represents these areas and summarizes Ranking Member Dicks' main points:

- Defense
 - Regardless of whether President Obama exempts military personnel from sequestration, Ranking Member Dicks noted that the size of across the board cuts would significantly affect defense spending. It could mean a reduction of 10 percent on discretionary appropriations for Defense (Function 050 programs) and a \$55 billion cut in FY2013 defense appropriations over the last three-fourths of the fiscal year. Because of the across the board nature of the cuts, the funding decreases would impact a range of programs and facilities.
- Homeland Security
 - Ranking Member Dicks predicted a nearly 8 percent reduction for Customs and Border Patrol (CBP), the Transportation Security Administration (TSA), and Immigration and Customs Enforcement (ICE), which would translate to cuts in officers from all of those agencies. This would mean approximately:
 - a 25% reduction in Border Patrol agents;
 - a 7.5% reduction of CBP officers who works at airports and ports of entry;
 - the elimination of 9,000 screeners by TSA; and
 - a \$440 million cut in funding for ICE, translating into the elimination of 550 criminal investigators and intelligence analysts.

- Water
 - Sequestration would have a range of effects with respect to sequestration including about \$194 million from the Clean Water and Safe Drinking Water funds for corresponding infrastructure through the United States.
- Education
 - Ranking Member Dicks estimated that sequestration would necessitate a reduction by Job Corps in student slots by more than 4,600 among other reductions.
- Health, Science, and Innovation
 - Ranking Member Dicks predicted that roughly 800,000-1,100,000 fewer patients would be served in Community Health Centers as a result of sequestration.
- Safety-Net Programs
 - According to Ranking Member Dicks, approximately 35,000 low income children of working parents would lose child care and development block grant assistance. There would also be 173,000 tenants evicted from their housing and less capacity to serve the homeless, with around 31,500 without shelters. In addition, under sequestration, more than 47,000 of the approximately 596,000 current participants would have to be removed from the Commodity Supplemental Food Program. The Supplemental Nutrition Program for Women, Infants, and Children (WIC) would have to drop over a million participants.

Ranking Member Dicks noted that sequestration would result in a reduction of 7.8 percent on discretionary appropriations for nondefense programs, resulting in a \$39 billion cut in FY2013 nondefense appropriations to take effect in January of 2013.

Senate Budget Committee

On October 11th, Senate Budget Committee Chairman Kent Conrad (D-ND) joined Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations Chairman Carl Levin (D-MI) in sending a letter to the Super Committee opposing another repatriation corporate tax break as was created in 2004.

The letter recommended a biennial budget process noting that Congress' time is constantly consumed by the current budget process not allowing it focus on longer-term budgetary issues and oversight including performance based reviews of federal programs. The details on biennial budgeting have not been completely worked out, but the concept is to have the year when the budget does not need to be passed dedicated to reforming underperforming federal programs.

In addition, the Senate Budget Committee recommended procedural changes to disallow filibusters concerning budget resolutions and reconciliations and allow more time for Senators to review amendments to the budget.

HOUSE RESOLUTION OF DISAPPROVAL REGARDING DEBT LIMIT INCREASE

In a symbolic vote, on September 14 the House passed a joint resolution (H.J. Res. 77) disapproving of the request by President Obama for a \$500 billion debt limit increase. The disapproval resolution process was provided for in the Budget Control Act (P.L. 112-25) as a means for Republicans to express their opposition to the debt limit increase. A companion measure (S.J. Res. 25) was blocked in the Senate.

BALANCED BUDGET AMENDMENT

The Budget Control Act (P.L. 112-25) mandated that the House and the Senate each vote on a balanced-budget amendment between September 30 and December 31, 2011. The House Judiciary Committee held a hearing on October 4 to discuss the balanced-budget amendment which included testimony from former Congressional Budget Office Director Douglas Holtz-Eakin, among others. Two versions of a balanced-budget amendment have been proposed in the House: H.J. Res. 1 which in addition to balancing the budget would cap federal spending at 18 percent of the gross domestic product and require a super-majority vote in both chambers to increase the debt limit; this version currently has 133 co-sponsors, only one of which is a Democrat. A less restrictive version, H.J. Res. 2, which does not include the spending cap and debt limit provisions, has garnered 242 cosponsors and is the more likely of the two to gain the two-thirds majority required to pass a balanced-budget amendment. The House plans to vote on a measure in November.

JOBS PROPOSALS

A number of Democratic and Republican Jobs Proposals were put forth in September and October.

Speaking before a Joint Session of Congress on September 8, President Barack Obama outlined *The American Jobs Act* and called on Congress to pass the \$447 billion jobs package which included payroll tax cuts for employers and employees, infrastructure investment, assistance to homeowners, state and local aid to retain teachers and first responders, and an extension of unemployment insurance and other measures to assist the long-term unemployed. Senate Majority Leader Harry Reid (D-NV) introduced the measure (S. 1660), amended to include an offset through a surtax on millionaires by raising the top tax rate for gross income over \$1 million (beginning in 2013) by 5.6 percent to replace other tax provisions proposed by the President, including oil and gas industry tax increases and an increase in taxes for individual income over \$200,000 and household income over \$250,000. A cloture vote on the measure failed in the Senate on October 11 by a vote of 51-48, defeating the proposal.

Majority Leader Reid subsequently introduced two scaled-down jobs bills featuring separate components of the President's larger package. The first, the *Teachers and First Responders Back to Work Act* (S. 1723) was introduced on October 17 and defeated by a 50-50 cloture vote on October 20. The bill would have provided \$30 billion for hiring / retaining teachers and \$5 billion for hiring / retaining first responders. The measure was offset with a smaller "millionaire" surtax of .5 percent.

The second scaled-down measure, referred to as the *Rebuild America Act*, was introduced on October 21 by Majority Leader Reid and Senator Amy Klobuchar (D-MN) and was endorsed by Transportation Secretary Ray LaHood. This bill would provide \$50 billion for transportation

investment - \$27 billion for highway and rail projects; \$5 billion for TIGER grants and TIFIA funding; \$9 billion for transit programs; \$2 billion for airport development; \$1 billion for the Federal Aviation Administration's NextGen air traffic control system upgrade; \$4 billion for passenger-rail upgrades, including some high speed rail projects; and \$2 billion for Amtrak equipment and infrastructure. The bill also creates a \$10 billion National Infrastructure Bank. The bill is offset with a .7 percent surtax on household income over \$1 million. Majority Leader Reid intends to hold a vote on the measure when the Senate returns from its recess next week. As with the two prior jobs proposals, this bill is also unlikely to secure the sixty votes needed to move forward. Majority Leader Reid intends to introduce two additional jobs-related measures focused on components of the President's proposal in the coming weeks.

On September 15, Speaker of the House John Boehner (R-OH) offered an alternative to the President's plan, which focused primarily on removing regulatory burdens, amending the tax code, opening new markets to American-made products, and increasing domestic energy production.

On October 13, Republican Senators John McCain (R-AZ), Rob Portman (R-OH), and Rand Paul (R-KY) released an outline of their *Jobs Through Growth Act*. The proposal includes a number of initiatives seen in prior iterations of Republican jobs-related agendas: a constitutional amendment mandating a balanced federal budget; presidential line-item veto power; repeal of the 3 percent IRS withholding from payments to government contractors; repeal of healthcare reform; regulatory overhaul; expansion of offshore energy production; and some corporate / small business tax reform. With little overlap to the Democratic proposal, it is unlikely this will serve as more than political positioning on jobs-related items going forward.

New Presidential Proposal on Jobs and Competitiveness

Continuing his efforts to bolster the economy and create jobs, President Obama issued a Presidential Memorandum on October 28 "to put Americans back to work and strengthen the economy because we can't wait for Congressional Republicans to act." The Memorandum announces two new initiatives.

The first initiative aims to speed the transfer of federal research and development from the laboratory to the marketplace. The Memorandum:

- Directs agencies to streamline and accelerate the process for private-public research partnerships, small business research and development grants, and university-startup collaborations. The White House predicts that this will result in grants to startups being made 50% faster;
- Increasing agency flexibility to partner with industry, encouraging new partnerships with local communities, supporting the growth of regional innovation clusters, and sharing laboratory facilities with local businesses and others; and
- Increases accountability by directing agencies to develop a five-year plan with concrete goals and metrics to measure progress, including keeping track of how many patents each lab is generating.

The Memorandum also creates a new, centralized online “one-stop shop” for information regarding federal programs and services relevant to small businesses and businesses of all sizes that want to begin or increase exporting. BusinessUSA, working under a “No Wrong Door Policy,” will use technology to “quickly connect businesses to the services and information relevant to them, regardless” of where information is located on an agency website or which agency – online or not – a business starts with for assistance. As agencies add content, the site will grow become more robust in its usefulness to the business community as a central information depository. To that end, BusinessUSA will be designed from the start with regular input from the business and relevant online communities and, ultimately, hopes to include state, local and private sector partners as well. The Administration is directed to create BusinessUSA within 90 days of the Memorandum’s issuance – i.e. by January 26, 2012, which will coincide with the approximate date on which President Obama would be delivering the final State of the Union address of his current term.

TRANSPORTATION

SAFETEA-LU Reauthorization

Senate Action

On October 20, Senate Environment and Public Works Chairman Barbara Boxer (D-CA) made the major announcement that the committee would be marking up the highway title of a two-year reauthorization bill on November 9. The mark-up, which would be the first in the 112th Congress and the first real mark-up of reauthorization legislation since SAFETEA-LU expired, has been long delayed as Chairman Boxer waited for the Senate Finance Committee to identify the \$12 billion in additional revenue needed to fund a two-year bill at current levels. As discussed below, it remains unclear whether or not the Senate Finance Committee will agree on revenue offsets before the November 9 markup. Chairman Boxer has continued to press Chairman Max Baucus (D-MT) to produce the revenue title while also working to gain the consent of the bipartisan leadership of the transportation authorizing committees to move forward with her mark-up should the Finance Committee not act beforehand.

Senate Finance Committee Chairman Max Baucus (D-MT) is reportedly focusing on presenting the committee with at least two revenue options, but has not yet decided on the direction. The first would use narrow health-related savings totaling \$13 billion over 10 years as the offset; and the second would end certain exceptions to the current fuel tax address fuel-related theft and tax fraud to raise a similar amount. The timing of action in the Finance Committee remains in doubt as there continues to be reluctance to bringing forward a revenue package outside of the Super Committee process; and as most observers believe that all major revenue and spending decisions will be postponed until after the Super Committee issues its recommendations.

Reflecting the potential role of the Super Committee, Chairman Boxer joined Ranking Member Inhofe in urging the Super Committee to address the long term solvency of the Highway Trust Fund in its recommendations. In their joint letter to the Super Committee, Senators Boxer and Inhofe as the Super Committee to follow the example of the National Commission on Fiscal Responsibility

and Reform and the Gang of Six, both of which included revenue proposals that would provide long-term stability to the HTF at current funding levels.

House Action

The House Republican leadership continues to explore revenue options that would enable action on a six-year transportation bill at or near current funding levels. Speaker John Boehner (R-OH) has given several indications that he views the surface transportation bill as a potentially central element of a Republican jobs agenda. The Republican leadership is focusing on linking the revenue needed to fund a six-year bill to additional domestic energy production, where the funding gap would be met with new revenue from the sale of new oil and gas lease rights on Federal lands, plus a possible new tax negotiated with the oil and gas industry for new leasing rights. Notably, Chairman Mica, in his recommendations to the Super Committee, stated that because "both Chambers are currently working to identify appropriate revenues to finance [surface transportation] spending" that he would not be asking the Super Committee to address the solvency of the Highway Trust Fund. As the House continues to explore revenue options, there is still no timetable for release or mark-up of the House legislation.

Transportation Appropriations

A number of transportation related amendments have been considered as part of the Senate debate of the FY2012 appropriations "minibus" (H.R. 2112), but none have been adopted which make any significant policy or funding changes to transportation programs. Notably, the Senate voted to table Senator John McCain's (R-AZ) amendment that would prohibit transportation enhancement funds from being used on "lower-priority projects," such as transportation museums, scenic beautification, scenic or historic highway programs, and landscaping.

There are major differences between the House and Senate versions of the transportation appropriations bill that will have to be reconciled. The House bill sets a dramatically lower obligation limitation for Highway Trust Fund programs, whereas the Senate maintains the obligation limitation at current levels. In light of the six month SAFETEA-LU extension at current levels, it is likely that the obligation limitation will track this authorized level. On the discretionary side, the House bill eliminates funding for the TIGER program, funds New Starts at \$1.56 billion, and makes significant cuts to Amtrak. The Senate version *increases* funding for TIGER and New Starts (providing \$1.95 billion) and maintains Amtrak funding, meeting its budget authority target instead through more extensive cuts and rescissions to HUD programs. The Senate bill also provides that Bus Rapid Transit (BRT) projects are to be funded out of the discretionary Bus and Bus Facilities account, thus freeing additional funds for rail projects in the New Starts pipeline. In addition, the House bill includes a provision that would limit the maximum federal share for Full Funding Grant Agreements (FFGAs) to 50 percent, which would affect a number of projects in the pipeline, while the Senate maintains the maximum federal share at 60 percent.

National Infrastructure Bank

As noted above, the *Rebuild America Act* includes a provision which would create a \$10 billion National Infrastructure Bank, however, many supporters of infrastructure spending have called for a focus on the multi-year reauthorization as opposed to an additional, one-time infusion.

The President's proposal for a National Infrastructure Bank (NIB), capitalized with an initial \$10 billion, has also been met with significant resistance. Efforts by Senator Charles Schumer (D-NY) to pair the NIB with a tax repatriation holiday for foreign income ultimately did not gain traction in the Senate, facing resistance to both the NIB and tax proposals. It remains to be seen whether there will be any further Senate push on the NIB legislation. In the House, the Transportation and Infrastructure Subcommittee on Highways and Transit held a hearing on October 12th entitled "National Infrastructure Bank: More Bureaucracy & More Red Tape" that was highly critical of the NIB proposal. Chairman Mica subsequently stated that a NIB is "dead on arrival in Congress," prompting Secretary of Transportation Ray LaHood to concede that a NIB is "probably...not going very far." Chairman Mica has instead called for expanding and reforming existing innovative financing programs like State Infrastructure Banks, TIFIA, RRIF, and Private Activity Bonds.

FEDERAL AVIATION ADMINISTRATION (FAA) REAUTHORIZATION

There was general public disapproval after Congress allowed the FAA's program authority to lapse in July -- resulting in employee furloughs, the stoppage of trust fund revenue streams, and stalled airport projects -- before providing the FAA with a 21st short term extension. Thus when that short term extension expired on September 16th, Congress agreed to a longer extension through January 31, 2012.

In an ideal world, this four month temporary extension of FAA programs should give Congress enough time to reach a compromise on the longer term bill, yet it appears that there has been little progress in coming to a resolution over the issues that divide the chambers. The House has yet to even appoint conferees.

The major issue at stake in the long term reauthorization remains a provision in the House-passed bill, H.R. 658, to reverse the 2009 National Mediation Board ruling to count votes in organizing elections only of those who participate in that election. Three other big ticket items remain: Essential Air Service provisions, airport funding provisions, and beyond-the-perimeter slots at Reagan National Airport, although there may be other minor provisions not yet resolved. Also still undecided is the length of the long-term bill. It remains the widely held view among congressional staff and observers that the resolution of the NMB issue will be a catalyst to resolving the other issues, but no one knows when there will be movement. Action by the Super Committee, due on November 23, has put many other issues on hold pending the outcome of the Super Committee's deliberations on deficit reduction and revenues.

In House Transportation and Infrastructure Committee Chairman Mica's (R-FL) October 14 letter to the Super Committee, he stated that raising or eliminating the current \$4.50 Passenger Facility Charge cap could be a viable option, if done in conjunction with eliminating Airport Improvement

Program grants to larger airports. He emphasized that the details and consequences would need to be studied before he would decide whether to support such a deal.

HOME AFFORDABLE REFINANCE PROGRAM CHANGES

On October 24 the Federal Housing Finance Agency, along with Fannie Mae and Freddie Mac, announced a series of changes to the Home Affordable Refinance Program (HARP). The HARP program provides borrowers, who may not otherwise qualify for refinancing because of declining home values or reduced access to mortgage insurance, the ability to refinance their mortgages into a lower interest rate and/or more stable mortgage product.

These changes are intended to increase the number of homeowners who can refinance under the HARP program.

Borrowers must meet the following criteria:

- the mortgage must be owned or guaranteed by Freddie Mac or Fannie Mae and must have been sold to either entity on or before May 23, 2009
- the current loan to value ratio must be greater than 80% and
- the borrower must be current on the mortgage at the time of the refinance with no late payment in the past six months and no more than one late payment in the past twelve months.

This initiative was instituted this week through executive action and does not require congressional approval.

CHEMICAL SECURITY

The Department of Homeland Security's implementation of the Chemical Facility Anti-Terrorism Standards (CFATS) program continues despite short-term extensions. (The standards were otherwise set to expire on October 4 without an Act of Congress to continue funding through the appropriations process.) CFATS currently does *not* apply to drinking water or wastewater facilities. Both the Administration and Congressional Democrats, however, are strongly advocating that Congress pass long-term substantive reforms that would both strengthen chemical security standards to better protect public health and safety and to expand the program to cover both drinking water and wastewater facilities.

The House-passed FY2012 Homeland Security appropriations bill (H.R. 2017) includes a "clean" one-year extension of CFATS to October 4, 2012 – that would not extend to water facilities. It also includes Committee Report language directives that DHS study the use of "Inherently Safer Technologies" and expedite publication of ammonium nitrate regulations. (As previously reported, both the House Energy and Commerce Committee and the House Homeland Security Committee have already marked-up and favorably reported legislation that would extend existing CFATS legislation for seven years. H.R. 908 and H.R. 901 are still pending on the House floor.) Senate Environment and Public Works Committee – Superfund, Toxics and Environmental Health

Subcommittee Chairman Frank Lautenberg (D-NJ) introduced legislation (S. 711 and S. 709) earlier this year that would remove both the water and wastewater facility exemptions.

Although industry has become increasingly anxious over the resulting regulatory uncertainty, we continue to believe CFATS is likely to be extended, as is, for another year through the appropriations process. Doing so will provide additional time for Congress to sort through Committee jurisdictional issues and conference substantive differences between the House and Senate. House Republicans would prefer a long-term extension of existing regulations, whereas Senate and House Democrats would prefer substantive reforms that would both strengthen chemical security standards and expand the program to cover drinking water and wastewater facilities. (We have thus far successfully lobbied that any such expansion to water facilities be exclusively under the Environmental Protection Agency's jurisdiction and that there be a statutory appeals process for any facility designated as "high risk".)

ENERGY / CLIMATE CHANGE LEGISLATION

Energy Tax Legislation

There is broad bipartisan support for a comprehensive rewrite of the tax code, both to make it simpler and help make U.S. businesses more competitive. But there seems to be too little time left this year to complete such a massive undertaking. Hence, Members of the Super Committee are reportedly looking at the possibility of including language in their deficit reduction legislation that would direct the tax writing committees to report legislation next year that would achieve defined criteria, such as reducing corporate tax rates while at a minimum maintaining revenue neutrality or actually reducing the deficit through the elimination of "loopholes" and certain tax preferences.

In this context, a whole range of tax breaks would be in play, including those of interest to both the oil and gas industry and the renewable energy sector (that are slated to expire within the next few years). When President Obama originally put forward his jobs bill, he recommended eliminating oil and gas tax preferences. But Senate Democratic leaders decided to drop those and other recommended provisions, instead opting to fund the jobs legislation with a "millionaire's surtax". Earlier this month, in a largely symbolic vote, all but two Democrats voted in favor and all Republicans voted against the legislation. The bill did not get the necessary 60 votes to move forward.

Now that Senate Democratic leaders have seemingly abandoned the effort to tax the energy industry in the context of the jobs bill, and with the leadership likely to move to "Plan B" as a means of potentially moving portions of the President's jobs bill in smaller pieces, it is likely to focus on those provisions that would enjoy Republican support. Nonetheless, some Senate Democrats and mostly liberal House Democrats are continuing to urge the Super Committee to repeal "Big Oil" industry tax preferences as a means of helping to reduce the federal deficit.

Development of a National "Clean Energy Standard"

In his State of the Union Address, President Obama called on Congress to enact legislation that would increase the percentage of electricity generated from clean energy sources (including nuclear and natural gas) to 80% by 2035.

Despite the difficulty a "Clean Energy Standard" would face in the current Congress, Senate Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM) intends to float legislation after the Energy Information Administration reports back on design options next month. He has outlined a plan whereby utilities would gradually increase their clean energy portfolios over the next 40 years, beginning with a 45% target in 2035 and increasing to a 95% target in 2050. Bingaman, who announced he will be retiring from the Senate, has historically been an ardent advocate of a strict Renewable Energy Standard – something that could yet emerge as a legacy issue for him, but in the form of a Clean Energy Standard and then only if it remains narrowly focused. As Ranking Member Lisa Murkowski (R-AK) put it, if a CES bill becomes known as "cap and trade under a different name... then CES is not going to happen."

At a forum in New Mexico, Chairman Bingaman himself acknowledged the difficult prospects for enacting such a bill. He said, "I think that it's hard to see how we get the votes to pass it, and I think my effort has been to try to be sure that we do the best job we can of getting a clean energy standard designed in a way that would be good policy. We've taken pains to do that, and that's why we haven't rushed to introduce a bill."

Property Assessment Clean Energy (PACE) Home Energy Program

Approximately 25 states have enacted programs that allow homeowners to take advantage of up-front municipal financing benefits to upgrade home energy systems (eg, installing solar systems, energy efficiency retrofits) that are then repaid via property tax assessments. The popular program effectively stalled when the Federal Housing Finance Agency (FHFA) raised repayment concerns should a PACE-retrofitted home resident foreclose on their mortgage.

The bipartisan House legislation (H.R. 2599) to reauthorize the PACE program, which reflects compromise language intended to rectify FHFA's concerns, currently has 39 cosponsors. Senators Michael Bennett (D-CO) and Johnny Isakson (R-GA) will introduce the "Sensible Accounting to Value Energy (SAVE) Act" companion legislation in the Senate. It too is intended to address FHFA concerns and would essentially require the agencies to offer more attractive mortgage values on energy-efficient homes. The U.S. Chamber of Commerce, Center for American Progress, Natural Resources Defense Council, and U.S. Green Building Council all support the effort. Prospects for the legislation are uncertain. While it stands a better chance than many other bills that require funding in the current fiscal environment, it is not expected to move as stand-alone legislation and will likely need a moving legislative vehicle to reach the President's desk.

Upcoming Legislative Activity

The Senate Energy and Natural Resources Committee is expected to hold a hearing on U.S. investments in and deployment of clean energy technologies, when compared to what other countries are doing to bolster their industries. It is not expected to focus on the first-ever DOE loan guarantee to the now-bankrupt solar manufacturer Solyndra, which is currently the subject of multiple federal investigations. Ranking Member Murkowski has said she is concerned that that ongoing controversy may bring down the program, which she supports.

Republican lawmakers are also expected to continue criticizing the Administration over “green” stimulus programs. A Labor Department Inspector General report – requested by Senate Finance Committee Ranking Member Chuck Grassley (R-IA) – was critical of the Recovery Act’s “green jobs” program. It concluded that \$327 million remained unexpended as of June and recommended that remaining funds be recouped to the extent possible. House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) immediately issued a statement calling on President Obama to “move quickly to redirect these funds to deficit reduction and focus on broad-based job creation and economic recovery, not just a niche program that has fallen far short of expectations.”

House Republican leaders have thus far principally focused on legislative efforts intended to address high gas prices and spur energy-related job growth. The House has already passed legislation to expand domestic offshore oil and gas production and expedite onshore and offshore permitting.

We do not anticipate that any of the energy legislation approved by the House this year will move separately or as part of a jobs package later this year in the Senate. Given that the primary focus of Congress over the next few months will continue to be implementation of the Budget Control Act of 2011 and short-term measures to stimulate job creation, we do not expect any stand-alone energy legislation to be considered by the Senate this year.

EPA’s Greenhouse Gas and Related Regulatory Agenda

On September 2, the White House announced that it was withdrawing EPA’s draft rule to strengthen air quality standards for ozone, citing the need to reduce regulatory burdens and uncertainty as the economy continues to recover. Industry groups and House Republican leaders in particular had mounted intense pressure on the Administration to abandon efforts to tighten existing, President George W. Bush-era smog standards. Indeed, House Speaker John Boehner sent President Obama a letter immediately prior to the move that listed seven regulations that would cost at least \$1 billion annually to implement. The ozone rule was listed as the most expensive, as low as \$19 billion or as much as \$90 billion per year. EPA must now wait at least two years to propose stricter air quality standards for smog.

The Agency also did not meet a September 30 deadline to issue proposed greenhouse gas standards for power plants. It is the second such deadline missed. EPA is currently working on a new schedule to propose the rules. Under mounting pressure from some states, industry groups, and lawmakers, EPA is also easing regulations under the Cross-State Air Pollution Rule, which is intended to reduce air pollution from power plants that drift across state boundaries. EPA had

issued the final rule in July; the new move would essentially provide for permits that would allow certain states and companies to emit more air pollutants than previously allowed.

Meanwhile, House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) has increasingly focused on EPA's and the Department of Transportation's respective roles in developing new fuel economy standards. In a letter requesting documents from each agency as part of an unfolding investigation, he further wrote that, "[i]t has come to my attention that the new Corporate Average Fuel Economy and EPA vehicle greenhouse gas standards announced by President Obama and automobile manufacturers on July 29, 2011 were negotiated in secret, outside the scope of law and could generate significant negative impacts for consumers." He will undoubtedly pursue this matter with vigor and a great deal of publicity.

WATER RESOURCES AND WATER QUALITY

Clean Water Act

Whereas Democratic leaders in the 111th Congress moved legislation through congressional committees that would have reformed and dramatically expanded the scope of the Clean Water Act, a large coalition of bipartisan House Members have pressed EPA to abandon efforts to craft (non-binding) Clean Water Protection Guidance in the 112th Congress. Opponents to expanding the Act's scope believe it will usurp local jurisdiction and negatively impact the economy; proponents continue to believe that reform is necessary to restore CWA integrity and to better protect the environment. Legislative efforts to strengthen the Clean Water Act are unlikely to gain Republican approval in the House.

EPA received thousands of unique public comments on its proposed "Draft Guidance on Identifying Waters Protected by the Clean Water Act" by the July 31st submittal deadline. Numerous commenters requested that the agency undertake a traditional rulemaking process that would provide for additional public comments and agency briefings rather than simply finalizing the draft (non-binding) guidance. EPA, in conjunction with the Army Corp of Engineers, is now working on developing a proposed Clean Water Protection Rule "for determining whether a waterway, water body, or wetland is protected by the Clean Water Act" that we expect to be issued in January 2012. It is intended to make clear which waterbodies are protected under the Clean Water Act.

House Republicans have added "policy riders" to the FY2012 Interior-Environment appropriations bill (H.R. 2584) that would essentially prohibit the EPA (and, by extension, the Army Corp of Engineers through a similar rider included in the FY2012 Energy-Water appropriations bill) from spending funds to implement or enforce the draft guidance.

Clean Water and Drinking Water State Revolving Loan Funds

The House Interior and Environment Appropriations bill, which has been reported out of the Full Appropriations Committee, funds the State Revolving Funds at FY2008 levels, providing \$1.508

billion, which is \$1.046 billion below the FY2011 enacted level. This amount consists of \$689 million for the Clean Water SRF and \$829 million Drinking Water SRF.

On October 14, Senators Jack Reed (D-RI) and Lisa Murkowski (R-AK), the bi-partisan leadership of the Senate Appropriations Subcommittee on Interior, Environment and Related Agencies released draft text of the Senate FY2012 Interior, Environment and Related Agencies appropriations bill. The legislation has not been considered in subcommittee but was released to “to serve as the Chairman’s mark for our subcommittee,” offering a “starting point for further discussions with our Senate colleagues” and “a solid foundation for future negotiations with the House.” The Senate draft provides a significantly greater \$1.522 billion for the Clean Water SRF and \$963 million for the Drinking Water SRF.

State and Tribal Assistance Grants (STAG)

Both the House and the Senate drafts of the Interior Appropriations bill rescind unobligated balances from prior-year STAG earmarks, though in different amounts. The rescission would come on top of a \$140 million rescission of unobligated earmark balances enacted through the final FY2011 Continuing Resolution. The House bill would rescind an additional \$140 million in unobligated balances from the STAG and Superfund accounts; and the Senate bill would rescind \$34 million from those accounts. This continues the imperative to obligate prior-year STAG earmarks as quickly as possible.

Water Quality Protection and Job Creation Act

Congressman Tim Bishop (D-NY), Ranking Member of the jurisdictional House Transportation and Infrastructure Subcommittee, has introduced the “Water Quality Protection and Job Creation Act” (H.R. 3145) to authorize \$13.8 billion for the Clean Water State Revolving Fund over 5 years. To finance its water infrastructure investments, the bill would create a \$10 billion Clean Water Trust Fund, to be funded by revenue streams that will be suggested by the Congressional Budget Office, in consultation with the EPA Administrator and Secretary of the Treasury. The bill would also allow EPA to provide loans to the State Revolving Funds and loan guarantees directly to large water infrastructure projects that are not likely to receive SRF funding. The loan authority would be divided among all states in proportion to their share of the SRF capitalization grants. All projects receiving a loan or loan guarantee would have to meet the same terms and conditions applicable to the Clean Water SRF program.

The bill faces serious challenges in the current Congress, both because of its nearly \$14 billion price tag and proposal to pay for it through a new Trust Fund, to be funded by unspecified taxes and revenue measures. The bill is written to apply only to wastewater infrastructure and thus to remain under the jurisdiction of the House Transportation and Infrastructure Committee. With respect to drinking water infrastructure funding, Democrats on the jurisdictional House Energy and Commerce Committee last week urged the congressional Super Committee to reauthorize the Drinking Water SRF in order to create jobs and reduce long-term infrastructure costs.

Water Infrastructure Finance and Innovation Act (WIFIA)

WIFIA, which was developed by the leading groups representing drinking water and wastewater utilities, is based on the broadly bi-partisan TIFIA program and will provide low-interest loans and loan guarantees directly to large water infrastructure projects (over \$20 million) while allowing State Revolving Funds to aggregate smaller projects to meet this minimum threshold. In this way, WIFIA addresses the current gap for large, regionally significant projects while ensuring that projects of all sizes – in all areas – can benefit. In addition, eligibility for WIFIA is broadened beyond the traditional SRF criteria, which focus on environmental compliance, to encompass projects to repair and replace aging and failing infrastructure.

Earlier this summer, the US Conference of Mayors adopted a resolution in support of WIFIA and the proposal was included the Conference of Mayors' Common Sense Jobs Agenda. WIFIA is currently under serious consideration by the majority leadership and staff of the House Transportation and Infrastructure Water Resources Subcommittee. Notably, House Transportation and Infrastructure Committee Chairman John Mica (R-FL) has recently said there may be a possibility for unspecified water infrastructure financing initiatives to be included in the surface transportation reauthorization bill.

While the water sector leaders advocating for WIFIA view the loan and loan guarantee provisions included in the Water Quality Protection and Job Creation Act as a positive step forward, they point out several critical differences between the two proposals. Most significantly, the Water Quality Protection and Job Creation Act provides for loans to SRFs only, and does allow for loans directly to large projects. Because the loan authority is subdivided among all 50 SRFs, there is also concern that there will continue not to be capacity to address large, regionally significant projects. In addition, because the bill adopts all SRF requirements, projects must be on the SRF priority lists - which many large projects are not or cannot be - and eligibility remains limited to environmental compliance and public health projects. By contrast, WIFIA's sponsors note that is intended as a complement to the SRFs, providing a highly leveraged innovative financing tool that will be open to the SRFs while addressing the gap for large, regionally significant projects and providing a means to address that nation's massive water infrastructure repair and replacement needs.

FLOOD INSURANCE REFORM

The National Flood Insurance Program, which was due to expire September 30, 2011, was extended in the Continuing Resolution running through November 18.

The Senate Banking Committee marked up the *Flood Insurance Reform and Modernization Act of 2011* on September 9. Since the bill still needs to be passed by the Senate and conferenced with the House-passed legislation, it is likely that another short term extension will be required.

On July 12 the House overwhelming passed the *Flood Insurance Reform Act of 2011* (H.R. 1309) by a vote of 406 to 22. The bill would reauthorize the National Flood Insurance Program (NFIP) for five years while providing for the elimination of nearly \$18 billion in accrued debt.

The bill would phase in actuarial rates for flood insurance policy holders while phasing out tax subsidies for high-risk properties. These actions are expected to raise \$4.2 billion over the next ten years. The bill also provides greater flexibility in utilizing private insurance markets to Federal Emergency Management Agency (FEMA) and insurance purchasers and provides those with homes located in flood plains an additional three years to purchase flood insurance.

TELECOMMUNICATIONS

Public Safety Spectrum Continues Along Dual Track

The House Subcommittee on Communications and Technology failed to send a spectrum recommendation by the October 14 deadline to the Joint Select Committee on Deficit Reduction as many had predicted. Rather Subcommittee Chairman Greg Walden (R-OR) has said that spectrum reform is too important to rush and that his panel will take up the bill in regular order as he continues discussions with his Democratic counterparts to forge a compromise bill.

Industry stakeholders had expected Chairman Walden to offer a marked-up House alternative to S. 911, the Senate Commerce Committee's bill, by the deadline for House and Senate committees to send recommendations to the Joint Select Committee. While Walden did not, Senate Commerce Committee Chairman Jay Rockefeller (D-WV) and Ranking Member Kay Bailey Hutchison (R-TX) sent an October 14 letter to the Joint Select Committee endorsing their spectrum plan, which passed the committee by a strong 21-4 bipartisan vote on June 8. S. 911 would reallocate the 700 MHz of spectrum known as the D Block to first responders and provide funding to build a nationwide interoperable public safety network.

While the Congressional Budget Office said S. 911 would generate \$6.5 billion for deficit reduction through incentive auctions of broadcast and satellite spectrum, Rockefeller and Hutchison opened the door to "possible ways to amend S. 911 to provide \$10 billion in deficit reduction without compromising rural build out for public safety officials." This statement has led some to question whether reallocation of the D Block, valued at approximately \$3 billion, is up for discussion. S. 911 also contains R&D funding, which also may be at stake.

The D Block remains the key sticking point between Republicans and Democrats on the House Communications and Technology Subcommittee, with panel Ranking Member Anna Eshoo (D-CA) acknowledging that she and her GOP counterparts may have to "agree to disagree" and vowing to offer an amendment on that point once the bill is slated for markup. No date has been set for markup. Other points of negotiation include the governance structure of the public safety network and interoperability of devices on the network.

Even as Subcommittee Chairman Walden works to craft a compromise spectrum bill, many stakeholders believe that the Joint Select Committee could consider a House spectrum plan without a markup, chiefly because House Energy and Commerce Committee Chairman Fred Upton (R-MI) serves on the Joint Select Committee. Either way, that leaves the Joint Select Committee with just about a month to compare any House proposal to S. 911, as they close in on a November 23rd deadline to make their own recommendations to both chambers about how to reduce the deficit pursuant to the Budget Control Act. With Sen. John Kerry (D-MA), Chairman of the Senate

Communications, Technology, and the Internet Subcommittee, also serving on the Joint Select Committee, many stakeholders believe that the debate at the Joint Select Committee also may come down to whether to reallocate the D Block for public safety.

The D Block's reallocation and building a public safety network remain components of the President's jobs plan, although the Senate has dealt several blows to the plan already. Last week, the President's American Jobs Act failed by nine votes to overcome a Republican-led filibuster, when a united GOP Conference and two moderate Democrats — Montana Senator Jon Tester and Nebraska's Ben Nelson — prevented the plan from even coming for debate, arguing it spent too much with uncertain results to the economy.

As a result, lawmakers from both parties have tried to carve out pieces of the sprawling package. On their first attempt at moving a piece of the jobs agenda, Democrats tried to advance the \$35 billion state aid package, saying it would protect the jobs of 400,000 educators and thousands more first responders. On October 20, however, Democrats fell short of the 60 votes needed to move forward the \$35 billion package.

At the end of day, observers still believe that Congress will pass spectrum legislation later this year - most likely through whatever measure the Joint Select Committee adopts.

Public, Educational and Governmental (PEG) Channel Access

Representative Tammy Baldwin (D-WI) continues her effort to increase support for and urge action on H.R. 1746, the Community Access Preservation (CAP) Act this Congress. The bill allows communities more flexibility to use public, educational and government access (PEG) channel (PEG) funding for more than "capital costs," as the CAP Act not only aims to save PEG channels but could also create or save between 7,000 and 10,000 jobs across the country. The bill specifically:

- Allows PEG fees to be used for any PEG-related purpose;
- Prevents cable operators from charging for the transmission of the channels;
- Requires the FCC to study the effect state video franchise laws have had on PEG channels; and
- Requires operators to provide the support required under state laws, or the support historically provided for PEG, or up to 2% of gross revenue, whichever is greater.

A major impediment to action on the bill is the current lack of Republican support. Although the bill has 51 cosponsors, only three are Republican. Those members include Representatives Walter Jones (R-NC), John Olver (R-MA) and John Duncan (R-TN). While there does not seem to be opposition to the substance of the proposal, it is clear that additional education is needed. At the same time, the search for a Senate champion is ongoing.

FCC Set to Take on USF Reform

The Federal Communications Commission's plan to overhaul the Universal Service Fund that subsidizes telecommunications service to rural areas could end up leaving those consumers out in the dark, according to former Senator Byron Dorgan (D-ND).

The commission is set to vote on October 27 on Chairman Julius Genachowski's proposal for shifting the focus of the \$4.5 billion high-cost portion of the Universal Service Fund from landline phone service to broadband service.

Dorgan, who has consulted for rural carriers, told the press that he is concerned that proposed caps on the total size of the fund as well as the amount individual carriers can recoup could dissuade telecom firms from investing in rural areas.

While not divulging many details of the FCC plan, Chairman Genachowski has asserted that the underlying goal of his USF and intercarrier compensation ("ICC") reform proposal is to hasten the deployment of high-speed Internet services nationwide, a goal of the agency's National Broadband Plan.

He also vowed that the agency will not simply "rubber-stamp" or "adopt wholesale" the proposals of any industry stakeholder. "The core elements of our plan were presented in the National Broadband Plan, and included in our notice of proposed rulemaking back in February," he said. "We benefited from a number of fully developed proposals, including joint proposals from the state members of the Federal-State Joint Board on Universal Service, the rate-of-return carrier associations, and the [America's Broadband Connectivity] plan."

Observers have widely believed that the agency would use the ABC plan, which was filed with the agency in August by incumbent telephone companies and the National Telecommunications Cooperative Association among others, as a "baseline" for a final order. But Genachowski confirmed that his proposal will feature only "elements" of stakeholder-proposed plans, while rejecting other "suggested policies."

His proposal will not eliminate states' carrier-of-last-resort obligations, for example. It will also not preempt state jurisdiction to designate eligible telecommunications carriers—those entities that can receive universal service support.

During recent months, state regulators have threatened legal action if the FCC were to adopt the ABC plan. Their main concern with the ABC plan is being stripped of their authority to continue overseeing intrastate telecom services.

In a recent speech, Genachowski said that under his proposal, states will have a "vital and meaningful role in ensuring accountability for broadband build-out obligations, continuing their crucial responsibilities for protecting consumers."

As part of Genachowski's plan, the agency would eliminate the Universal Service Fund's so-called "high-cost fund"—the largest part of the universal service program with a budget of \$4.3 billion for

2010—in several phases during the next 10 years. The money would be shifted to a new "Connect America" fund to subsidize the cost of providing broadband Internet service—instead of telephone service—in areas where, absent such support, broadband would not be available.

Historically, most telephone and cable companies have not built out broadband infrastructure in rural areas because of the high costs. Under Genachowski's plan, the new Connect America fund would rely on competitive bidding, or a reverse auction, to award subsidies to companies for "wired" broadband infrastructure deployment in these areas where there are currently no "unsubsidized competitors"—in other words, where there is no broadband service available from any company, be it a cable operator, telecom company, or wireless carrier.

Genachowski said that the FCC would transition toward a "fully competitive system" for distributing Connect America fund dollars. How the agency will implement that transition is still unclear. One of the key issues, which will not be addressed in Genachowski's order, is who will contribute to the new broadband-subsidy fund. That may be taken up early next year but no sooner.

Online Business Taxes

On October 12, Representatives Jackie Speier (D-CA) and Steve Womack (R-AK) introduced H.R. 3170, the Marketplace Equity Act. At its heart, the bill gives states the authority to compel online retailers to collect sales taxes. The bill joins a list of legislation now pending to address online tax issues. Other bills include:

- H.R. 1439, the Business Activity Tax Simplification Act -- Introduced by House Judiciary Subcommittee on Intellectual Property, Competition, and the Internet Chairman Bob Goodlatte (R-VA), the bill passed the House Judiciary Committee on July 8 and is pending House floor action. The bill expands protections in current law to include intangible property and services, as well as tangible personal property. Of particular importance, the bill establishes a "physical presence" test that requires an out-of-state company to have an actual physical presence in a state before the state can impose business activity taxes on the company;
- S.1452/H.R. 2701, the Main Street Fairness Act -- Introduced on July 29 in both the House and Senate by House Judiciary Committee Chairman John Conyers (D-MI) and long-time sponsor, Senator Dick Durbin (D-IL), the bill allows states that adopt a national streamlined sales-tax agreement to require out-of-state retailers to collect sales taxes already owed for online purchases. Both Conyers and Durbin hope to secure bi-partisan co-sponsors of their measures in an effort to demonstrate to leadership that the bills should move forward. The U.S. Conference of Mayors and the National Conference of State Legislatures, among others, support the Durbin proposal. In fact, there is talk that Senator Durbin plans to join two Republican co-sponsors in introducing a bipartisan bill next week to allow states to require out-of-state remote retailers to collect state sales and use taxes even if some states have not adopted a streamlined sales-tax agreement. The bipartisan measure would present an alternative for states that have been unable to reach a streamlined agreement, but preserve the essential elements of Senator Durbin's S. 1452. States, however, would still have to

comply with certain requirements under the bipartisan plan, such as developing a single tax return and ensuring the product definitions are the same for purposes of taxation. H.R. 3170 differs, in particular, from S. 1452 by giving states flexibility in crafting their tax policies to conform to the law rather than permitting the adoption of a national streamlined sales-tax agreement to require out-of-state retailers to collect sales taxes for online purchases.

In other tax news, H.R. 1002, the Wireless Tax Fairness Act of 2011- sponsored by Representative Zoe Lofgren (D-CA) – was reported by the House Judiciary Committee on July 18. The bill imposes a five-year ban on new taxes and fees targeting only wireless services and not imposed on other goods and services. The bill would not affect taxes already in place.

Federal Communications Commission

Next Generation 911

On September 22, 2011, the Federal Communications Commission adopted a Notice of Proposed Rulemaking (NPRM) in the Next Generation 911 (NG911) proceeding. The NG911 NPRM seeks comment on a number of issues related to accelerating the development and deployment of NG911 technology that will enable the public to send emergency communications to 911 Public Safety Answering Points (PSAPs) via text, photos, videos, and data and enhance the information available to PSAPs and first responders for assessing and responding to emergencies. On October 12, 2011, the Federal Register published a summary of the NG911 NPRM. Comments must be filed on or before December 12, 2011; and reply comments must be filed on or before January 10, 2012.

October 27 FCC Open Meeting

On October 27 the FCC will hold its monthly open meeting. At the meeting, the Commission will consider: 1) a Notice of Proposed Rulemaking (NPRM) to reform the Universal Service Fund to support Broadband services; 2) an NPRM to replace television broadcast stations' public files with online public files to be hosted by the Commission; and 3) will receive a status report by the Public Safety and Homeland Security Bureau on preparations for the national test of the Emergency Alert System to be held on November 9, 2011.

MUNICIPAL BOND CAP

Two recent proposals out of the Obama Administration - the American Jobs Act, which was modified but failed to move forward in the Senate and a draft Plan for Economic Growth and Deficit Reduction - have proposed capping the exemption of municipal bond interest at 28%. The proposal would be retroactive in that it would apply to interest on bonds governments have already issued and investors have already purchased.

The President proposed the municipal bond interest cap as one of the options to offset the cost of the American Jobs Act. When the bill came to the Senate floor, Senate Majority Leader Harry Reid (D -NV) stripped out the President's "offsets" and instead inserted a 5.7% surtax on those earning over a million dollars. The bill did not pass.

Federal tax exemption on municipal bond interest has been in place since the start of the federal income tax in 1913. According to the White House, the cap could save \$230 billion over five years which amounts to about 15% of the \$1.5 trillion in spending cuts or revenue increases that the Super Committee must find by November 23.

State and local governments, the Government Finance Officers Association and others oppose this proposal stating that the outcome would be higher borrowing costs for state and local governments, less investment in infrastructure and thus fewer jobs, and would come at the wrong time when the country's economic recovery is faltering, state and local finances are already under pressure and infrastructure investment is lagging.

WITHHOLDING TAX RELIEF ACT OF 2011

Earlier this year we reported that the IRS extended the effective date of Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 to January 1, 2013. This section would require State and Local governments that expend more than \$100 million per year in outside contracts to withhold three percent of all payments for goods and services, remit that to the IRS, and adhere to new reporting requirements. Payments of less than \$10,000 are exempt from the mandate. The Joint Committee on Taxation (JCT) estimated revenue effects of the bill would be approximately \$11.2 billion through 2021.

Numerous stand-alone bills have been introduced to permanently repeal the provision and language was included in both Democratic and Republican job creation proposals to either repeal the provision or extend its effective date to January 2014 (H.R. 674 / S. 89 / S. 164 / S. 1660 / S. 1720 / S. 1726).

On October 20 Senate Minority Leader Mitch McConnell (R-KY) filed a motion to limit debate and set up a vote on his version of the bill (S. 1726). As with the earlier versions, McConnell's bill permanently repealed the tax provision, but also rescinded \$30 billion of unobligated discretionary appropriations (excluding Department of Defense and Veterans Affairs funding) to offset the \$11.2 billion loss of revenue. Despite bipartisan support for the repeal, the vote failed 57 to 43 because of Democratic opposition to the proposed offset. Following the vote, Senate Democrats indicated they were working on their own bill to repeal the provision and would offset the cost through oil and gas company taxes and the elimination of some foreign tax credits.

Additionally, on October 13th the House Ways and Means Committee approved H.R. 674 by a party line vote with no amendments and on October 27th the bill passed by an overwhelming majority in the full House (405 to 16). The House also approved a bill which would amend the Internal Revenue Code to include social security benefits that are currently excluded in the calculation of modified adjusted gross income for purposes of determining eligibility for certain healthcare-related programs (H.R. 2576). Under a rule established for considering the two measures, the healthcare bill was added to H.R. 674 to serve as an offset. The combined measure now awaits consideration in the Senate where it is also likely to be approved.