



Strategies Key Contacts

Shane Doucet
T: 202-220-6929
sdoucet@lockelord.com

Douglas P. Faucette
T: 202-220-6961
dfaucette@lockelord.com

Denise Hanna
T: 202-220-6992
dhanna@lockelord.com

Brian Heindl
T: 202-220-6994
bheindl@lockelord.com

Harriet Miers
T: 202-220-6925
hmiers@lockelord.com

Jim Moriarty
T: 202-220-6915
jmoriarty@lockelord.com

Phil Rivers
T: 202-220-6927
privers@lockelord.com

Mark Siegel
T: 202-220-6926
msiegel@lockelord.com

Walter B. Smith, Jr.
T: 202-220-6936
wsmith@lockelord.com

The Week Ahead: November 14 - November 18

The House is expected to vote on the Workforce Democracy and Fairness Act, in response to the rules set by National Labor Relations Board (NLRB).

The Senate will consider a pending Republican bill to repeal a tax on contracts businesses make with the government and its Democratic amendment.

Banking & Financial Services

On Wednesday, November 9, **Sens. Carl Levin (D-Mich.)** and **Jeff Merkley (D-Ore.)** called on regulators to beef up proposed regulations to enforce the "Volcker rule," and they urged supporters of the law to counter opposition from the industry. The Volcker rule bars insured depository institutions from seeking to profit by trading in securities through their own accounts. However, the issue of when trading is "proprietary" is complicated. Several agencies — including the **Federal Reserve**, the **Office of the Comptroller of the Currency**, the **Federal Deposit Insurance Corporation** and the **Securities and Exchange Commission (SEC)** — issued a draft regulation last month that left many enforcement questions unanswered and also has drawn criticism. Levin said draft-rule disclosure provisions intended to curb conflicts of interest between banks and their clients were insufficient. The rule would require disclosures that "permit" clients to be aware of instances in which the bank is effectively betting against the clients.

Senate Majority Leader Harry Reid (D-Nev.) announced a second "minibus" on Tuesday, November 8. This three-bill package would combine the Energy-Water measure with Financial Services and State-Foreign Operations, both of which may prove to be controversial. One point of contention among the conferees is a provision that would revive an expired loan limit for mortgages backed by the **Federal Housing Administration**, **Fannie Mae** and **Freddie Mac**, raising the cap back to \$729,750 from \$625,500. **Sen. Richard Shelby (R-Ala.)**, a senior GOP appropriator and a conferee on the first minibus, said he would prefer this provision to be dropped, but is not sure that will happen. Debate on the bill will begin on Monday, November 14.

The House on Thursday, November 3, passed two bills to make it easier for small companies to raise capital to grow their businesses. **HR 2930, the Entrepreneur Access to Capital Act**, passed 407-17 and would permit "crowdfunding" to finance new businesses by allowing companies to accept and pool securities issuances up to \$1 million without registering with the SEC. **HR 2940, the Access to Capital for Job Creators Act**, passed 413-11 and would allow the use of general advertisements to solicit investors for non-publicly traded securities without having to register with the SEC as long as issuers market to "accredited investors."

Defense

The Senate probably will take up the fiscal 2012 defense authorization bill the week of November 14, following debate on a second "minibus" appropriations measure, several Senate aides said Wednesday, November 2. The authorization bill had been placed on indefinite hold amid White House



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Featured Profile

Health Care Practice Group

Several Locke Lord Strategies® attorneys and professionals focus their practices in the health care industry, giving the Firm's Washington, D.C., office a strong and experienced pool of knowledge to handle a wide range of legal, regulatory and advocacy matters for health industry clients. Firmwide, more than 30 Locke Lord attorneys have significant experience in health care law, including in the areas of transactional, regulatory, enforcement, litigation, insurance, corporate, government affairs and legislative advocacy and more.

Locke Lord Strategies closely tracked the enactment of the Patient Protection and Affordable Care Act, as amended, and supported clients' lobbying efforts that preceded the Act's passage. Now, Locke Lord Strategies advises clients on implementation issues, compliance obligations and strategic opportunities under the Affordable Care Act and related state reforms. Locke Lord Strategies® furnishes analysis, advocacy, client seminars and webinars, strategic counseling and assistance on key reforms under the Affordable Care Act which, among other things, include, health insurance market reforms, health insurance exchanges, medical loss ratio (MLR), accountable care organizations (ACOs) and medical homes, wellness initiatives, the Medicare Advantage star-rating bonus program and HHS/CMS grant opportunities (e.g., those available from the Innovation Center).

Locke Lord Strategies focuses primarily on four health care industry segments: Health Insurance and Managed Care; Physicians & Physician Groups; Hospitals and Health Systems; and Wellness and Care Coordination Companies. Health care attorneys in Washington, D.C., have represented health care payors and providers, pharmacy benefit management (PBM) companies, third party administrators, health and wellness companies, trade associations and other health care organizations in a range of transactional matters and in legislative, regulatory and administrative proceedings.

Our health care attorneys are experienced in representing health care organizations in general corporate matters, strategic ventures, financings, complex business transactions and antitrust matters, many of which involve issues and business relationships of first impression. Locke Lord's attorneys are actively involved on the national health care scene, serving on health care boards and associations, speaking at industry gatherings and staying at the forefront of health care reform issues.

Health Care Practice Group Chairs:

Lisa Genecov (Dallas) and Kevin Kroeker (Los Angeles)

Locke Lord Strategies Health Care Contacts:

Shane Doucet | T: 202-220-6929 | sdoucet@lockelord.com

Denise Hanna | T: 202-220-6992 | dhanna@lockelord.com

efforts to strike a provision in the bill that would require members of al Qaeda to be held in military custody rather than federal prisons. On Tuesday, November 1, **Sen. Carl Levin (D-Mich.)** said the detainee issue remains the biggest sticking point, but he acknowledged that the two parties are discussing other aspects of the sprawling bill. Among those, aides said, could be the top-line budget number.

Education

On Thursday, November 10, **Sen. Tom Harkin (D-Iowa)** pressed the House to produce a bipartisan rewrite of the **No Child Left Behind Act**. The statement, part of a Senate floor speech, was the first time the education committee chairman acknowledged that the lack of bipartisanship and movement in the House will affect the Senate's efforts. The Senate bill does face uncertain prospects if and when it is brought to the floor. Some Republicans who supported it in committee want to see significant changes before they vote for it again. The Obama administration also has been cool to the Senate plan, although it backed up Harkin's rhetoric Thursday night, with **Education Secretary Arne Duncan** also pushing the House to find a bipartisan path forward. **Rep. John Kline (R-Minn.)**, chairman of the **House Education and the Workforce Committee**, has taken a piecemeal approach to the issue. To date, the committee has produced three bills designed to fix specific problems, and only one garnered bipartisan support.

Energy/Environment/Climate Change

On Thursday, November 10, the Senate rejected, 41-56, a bill that would have nullified the **Environmental Protection Agency's (EPA)** cross-state air pollution rule that targets sulfur dioxide and nitrogen oxide emissions from power plants in 28 states in the Northeast and Mid-Atlantic regions that are blamed for poor air quality in neighboring states. The rule, finalized in July, replaces a George W. Bush administration air regulation that was ruled unlawful in a 2008 court decision.

The Obama Administration released a proposal that would allow new oil and gas development off the shores of Alaska and in the Gulf of Mexico. The proposal, expected to be made final next summer, would schedule 12 potential lease sales in the gulf and three off the coast of Alaska from 2012 to 2017. The plan would not permit drilling in any new eastern gulf regions or along Virginia's shores, although it would permit continued seismic exploration in Virginia waters. Congressional Republicans protested that the White House proposal would lock up energy resources along all U.S. shores that should be tapped.

At a **Senate Energy and Natural Resources Committee** hearing on Tuesday, November 8, Senators from both parties pressed an **Energy Department** official on the effect that allowing increased exports of liquefied natural gas would have on U.S. prices as advances in drilling techniques have boosted domestic production and driven costs to record lows. **Sen. Ron Wyden (D-Ore.)** said the wide discrepancy between Asian spot prices and U.S. futures of natural gas raises red flags for more liquid natural gas exports.

Health Care

As part of back-and-forth negotiations, Democrats on the joint deficit reduction committee proposed Monday, November 7, to cut \$400 billion in Medicare and Medicaid spending, as part of a broader proposal to pare \$2.3 trillion from the deficit over 10 years. The plan calls for using a portion of expected savings from winding down the wars in Iraq and Afghanistan to help prevent a scheduled 27.4 percent cut next year in the reimbursement rate for physicians who see Medicare patients. A House Democratic aide recently said war savings might finance total elimination of the Medicare payment formula triggering the cut, but it is unclear how far the Democrats' proposal would go in addressing the formula.

On Monday, October 31, President Obama signed an executive order to encourage, but not require, pharmaceutical companies to alert the Food and Drug Administration about challenges likely to lead to a drug shortage. Federal



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Insurance

At its Fall National Meeting, November 3-6, in Washington DC, the **National Association of Insurance Commissioners (NAIC)** adopted revisions to the Credit for Reinsurance Model Law and Regulation, which modernizes U.S. state-based regulation of reinsurance by reducing reinsurance collateral requirements for non-U.S. reinsurers.

The NAIC also announced that the Quarterly Listing of Alien Insurers is now available for reference and download from the NAIC website. The listing, specifically mentioned in the Nonadmitted Insurance title of the Dodd-Frank Wall Street Reform and Consumer Protection Act, identifies nonadmitted insurers domiciled outside of the U.S. with which surplus lines brokers may be confident of insurer eligibility.

The NAIC delayed until Tuesday, November 22, a discussion regarding an NAIC resolution urging the **Department of Health and Human Services (HHS)** to take whatever immediate actions are available to the HHS to mitigate the adverse effects the medical loss ratio rule is having on health insurance agents.

On Wednesday, November 2, the **Treasury Department** announced the appointment of 15 individuals to serve as members of the Federal Advisory Committee on Insurance. The Committee will provide advice to the Federal Insurance Office which was established as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Treasury announcement notes that states are the regulators of the U.S. insurance system and nearly half of the Committee is comprised of state insurance regulators. The remaining members have backgrounds ranging from consumer advocacy and academia to the business of insurance lines. The 15 individuals appointed to the Committee are: David Birnbaum, Center for Economic Justice; Michael Consedine,...

Continued on next page

officials say the number of prescriptions in short supply tripled from 2005 to 2010. Limited supplies of some drugs have sent prices soaring 1,000 times above normal. Congress is likely to address the issue in January, when lawmakers are slated to consider legislation to renew the FDA's authority to collect user fees from the drugmakers and devicemakers it regulates. Related, **Rep. Elijah Cummings (D-Md.)** has intensified his investigation into the prescription drug "gray market" after a drug supplier stopped returning his calls and did not provide any of the documents he had requested.

Immigration

The Senate cleared legislation by voice vote on Thursday, November 10, that would ease burdens faced by military spouses seeking U.S. citizenship while their partners are deployed overseas. The bill would allow deployed servicemembers and their spouses who cannot meet two 90-day deadlines for filing residency petitions and interviewing with the **Homeland Security Department** to suspend those deadlines, avoiding the prospect of having a spouse's conditional legal status terminated. Such termination can lead to the initiation of removal proceedings.

Labor, Pensions & Retirement

Some of the House's most ardent defenders of **Social Security** are softening their rhetoric against a proposed change to a key inflation measure that affects benefits, as the pressure to reach a deficit cutting deal mounts. The **Joint Select Committee on Deficit Reduction** appears to have reached some form of agreement over the new inflation barometer, known as the "chained" **Consumer Price Index (CPI)**. The chained CPI tends to produce inflation rates that are a few tenths of a percentage point lower than the current index. Because Social Security cost-of-living increases are pegged to inflation, a chained CPI would probably result in smaller benefits increases. According to the **Congressional Budget Office (CBO)**, moving to that inflation measure would produce savings of \$217 billion over a decade, of which \$112 billion would come from Social Security checks that would be smaller than under the existing inflation yardstick.

The **House Oversight and Government Reform Committee** on Thursday, November 3, advanced GOP legislation that would reduce the size of the federal civilian workforce by 10 percent through attrition over the next three years. The measure would require the **Office of Management and Budget (OMB)** to trim the 2 million-person federal civilian workforce by 10 percent before September 30, 2014. It would instruct agencies and departments to make those cuts by replacing only one of every three employees who retire or leave for other reasons.

Tax

Persuading House Republicans to accept new tax revenue as part of a deficit-cutting deal will be a challenge. **Rep. Jeb Hensarling (R-Texas)**, co-chairman of the joint deficit reduction committee acknowledged Thursday, November 10, while also pointing to what he said would be the economic benefits of a tax overhaul. Hensarling conceded there is resistance among Republicans to anything in a deal that could be construed as a tax increase. But he said a pro-growth tax overhaul would benefit the economy. In recent days, Republicans on the joint panel have softened their opposition to an increase in revenue, proposing a net increase of more than \$300 billion, including corporate and individual tax changes. But Democrats have dismissed the GOP plan, arguing that it would result in a large tax cut for those at the very top of the income scale. Democrats have insisted on increasing taxes by at least \$1 trillion.

Reps. Michael B. Enzi (R-Wyo.) and **Lamar Alexander (R-Tenn.)**, along with **Majority Whip Richard J. Durbin (D-Ill.)**, have introduced legislation with seven other cosponsors that would authorize states to require online merchants to collect and remit sales taxes. Proponents estimate that cash-strapped states are missing out on as much as \$23 billion in annual tax revenue. Under the Senate measure, states that participate in the **Streamlined Sales and Use Tax Agreement** would be



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Insurance (cont'd.)

Pennsylvania Insurance Commissioner; Jacqueline Cunningham, Virginia Commissioner of Insurance; John Degnan, Chubb Corporation; Brian Duperreault, Marsh & McLennan Companies; Loretta Fuller, Insurance Solutions Associates; Scott Harrington, Wharton School University of Pennsylvania; Benjamin Lawsky, New York Superintendent of Financial Services; Thomas Leonardi, Connecticut Commissioner of Insurance; Monica Lindeen, Montana Commissioner of Securities and Insurance; Christopher Mansfield, Liberty Mutual Group; Sean McGovern, Lloyd's North America; Theresa Miller, Oregon Insurance Administrator; Michael Sproule, New York Life Insurance Co.; Bill White, District of Columbia Insurance Commissioner.

On Friday, November 4, the **National Conference of Insurance Legislators (NCOIL)** issued a statement expressing frustration that the makeup of the Federal Advisory Committee on Insurance is missing a key perspective — that of a state lawmaker. NCOIL President, North Dakota Representative George Keiser, said the committee is overrepresented by regulators at the expense of legislators.

empowered to require online sales tax collection. There are 24 states now part of that compact, designed to simplify the system of collecting sales taxes to ease the burden of compliance on businesses.

A bipartisan group of House lawmakers is asking the joint deficit committee not to tax employer-sponsored health care benefits, a proposal that frequently pops up in deficit reduction talks. Lowering or capping the tax exclusion would reduce health coverage for Americans and end up increasing long-term federal spending, negating any revenue that would be gained, the lawmakers said in a letter to the committee signed by 160 members.

Telecommunications

On Thursday, November 10, the Senate rejected, 46-52, a motion to proceed to a joint resolution to scrap the administration's "net neutrality" rule. That resolution, spearheaded by **Sen. Kay Bailey Hutchison (R-Texas)**, would have invalidated rules adopted by the **Federal Communications Commission** in December 2010 and slated to take effect November 20, that would bar fixed broadband service providers from blocking content or applications and unnecessarily discriminating in transmitting network traffic. Mobile broadband service providers would be prohibited from blocking legal Web sites or applications that compete with their voice services.

Sens. John Kerry (D-Mass.) and **John McCain (R-Ariz.)** are urging the **Commerce Department** and the **Federal Trade Commission (FTC)** to publish two reports about Internet privacy. In April, Kerry and McCain introduced a privacy protection measure aimed at online and offline uses of personal data. The measure has not advanced in the Senate, but the final Commerce and FTC privacy reports could lend momentum on the issue — particularly if either shifts course and calls on lawmakers to write new data privacy rules. The Commerce Department is expected to issue its final report as early as this month. The FTC report is expected to be published in December.

Trade

The **Commerce Department** announced on Wednesday, November 9, that it is initiating an investigation of a complaint filed last month by U.S. solar manufacturers with the backing of some congressional Democrats that alleges a flood of Chinese solar panels imports violate international trade rules. The announcement paves the way for a lengthy review that could lead to the imposition of stiff tariffs on Chinese solar panels imports.

Transportation & Infrastructure

Prospects for enactment of a full six-year surface transportation reauthorization by this Congress are fading fast, as senators continue to search for a way to pay for just a two-year extension. Still missing from the Senate bill that won committee approval Wednesday, November 9, is a funding source to plug a \$12 billion gap between the funds generated for the **Highway Trust Fund** from current taxes and the authorized spending levels. The difficulty in finding a method for funding even a two-year bill illustrates the challenge facing **House Transportation and Infrastructure Chairman John L. Mica (R-Fla.)** who said as recently as last month that he favors a six-year bill. **House Speaker John Boehner (R-Ohio)** last week floated the idea of funding a transportation infrastructure bill by tying it to measures that would expand domestic oil and gas drilling. The new royalties would supplement the Highway Trust Fund, but Boehner's plan would increase the sales of leases to drill on public lands and in federal waters and ease some regulations for producers — ideas that are non-starters for many Democrats.