

PUBLICATION

What To Look For In The Next Congress

January 20, 2011

With the elections behind us, a new Congress before us and more new governors taking the helm than at any time in decades, what should you expect?

Let's begin by taking a second look at what happened in the recent lame duck session of Congress. It reflected a remarkable bipartisan effort to secure the national interest, both domestic and foreign, in an environment in which all issues are controversial. This bodes well for the 112th Congress, and linked with the tremendous pressure on members of both parties to act and Speaker Boehner's plan to produce smaller bills shaped by committee members, good work can be expected of the upcoming Congress.

A notable example of the lame duck's work was the bipartisan agreement struck on taxes and spending that clearly reflected the majority view of the good of the country. While the Democrats opposed permanent extension of all tax provisions, over many months a significant number of Democrats made it clear that they believed that no one should have their taxes increased. Thus the two-year extension of all the Bush tax cuts and other expiring tax provisions reflected a bipartisan majority opinion in the best tradition of consensus building.

On unemployment benefits, while concerns were raised about the impact on job search motivation of extending benefits for a whole year, a traditional and legitimate concern, it was not raised loudly. A bipartisan majority does not think the economy is going to improve at a pace that will allow all or even the most determined, to find work in the near future. In regard to "Don't Ask, Don't Tell", because opponents could see the direction court rulings were taking, a real bipartisan majority did not want the Defense Department to lose control over the implementation of this sensitive and important policy change. The same was true in regard to the treaty with Russia; the difference between the parties has been on missile defense. Once that was made clear to the public and consensus was reached on both greater domestic commitment to funding missile defense and our right to build such a system, the treaty passed by a solid majority.

The context for future action will be created by the lame duck's action on the budget. By extending it until March at current levels, the toughest issue raised in the elections - the size and cost of government - will collide head-on and very publicly with health care reform and other recent legislated changes. Both parties want this to be a center-piece debate, because neither can achieve their goals without a clearer determination by the public at large as to the nature of the partnership between the people and the central government in our federalist system. Rarely have we as a nation been at such a clear moment of choice in regard to a fundamental, structural issue. The answer will have profound implications for individual freedom and the power of state and local government.

Many of our clients will be affected by regulatory decisions that will be made in the next six to eight months. They will be affected as well by budget decisions that may impede implementation of regulations or by legislative decisions that may replace existing law with new solutions. At Baker Donelson we will be watching the regulatory process and encouraging congressional action on provisions of the bill that affect our clients adversely. We will also be talking to my former colleagues in Congress to anticipate events and protect our clients from making inappropriate investments or decisions. If you have a particular issue of concern, we can

develop an in-depth brief on the matter and advise you on how to make your opinion heard while the issue is still in flux.

Given the lame duck session agreements, it is even possible that the individual health insurance coverage mandate will be repealed and replaced by, for example, a requirement for states to develop a plan that will assure basic coverage of all. State systems differ widely and maximizing the participation of those currently eligible in Medicaid and SCHIP, coupled with more thoughtful citing of community health centers, the development of low-cost insurance plans, and incentives and subsidies for the uninsured to sign up, could accomplish the same purpose for a lot less money and less new bureaucracy. If the courts move in the direction of repeal, many who support the mandate may want a more flexible option to avoid a ruling on the constitutionality of the mandate and its permanent removal as an option. Other provisions in the bill could be replaced with less costly provisions which are not as controlled by federal offices. The twin goals of better coverage for all and access to coverage for pre-existing conditions are valued by both sides of the aisle and unlikely to change.

Early bills will likely deal with narrower topics, as Speaker John Boehner has specifically urged this approach. Two possibilities come to mind that have bipartisan support: reversing restrictions on physician ownership of hospitals and addressing the problems that are developing with competitive bidding of durable medical equipment. The physician ownership proposal did not arise from the Centers for Medicaid and Medicare Services (CMS) or the reform movement and was opposed by many Democrats, so a replacement bill could make it to the President's desk. Bipartisan concerns with the competitive bidding pilots could also power a restructuring of this important initiative.

Changes to the health reform legislation are more likely because so many of the new governors, most facing serious deficits and legally binding balanced budget requirements, are likely to raise their voices far more effectively against the very significant costs the new laws impose on them. Republicans won control of all but two of the states that will gain or lose Congressional seats as a result of the census and so will influence the redistricting of House seats in key swing states. They also went from controlling both chambers and the governor's seat in nine states (with 91 House seats) to controlling both chambers and the governor's seat in 20 states (with 188 House seats.) This will encourage more moderate Democrats in House and Senate seats in states that elected many Republicans to consider supporting legislation that reduces the cost and federal control embodied in health care reform.

This will be particularly true in the House if Speaker Boehner and the Republican Committee chairs include democrats in shaping the bills at the committee level. Speaker Boehner has chosen as his personal challenge, returning the House to civility. It is one of the few things he can accomplish in his first two years that will really leave a mark. He believes that the way to accomplish this is to include all members in the process of developing laws, maintain a balanced tone at the leadership and committee chair level, allow more amendments on the floor and get the people's work done. He has even said, "Sometimes the Democrats will win." Through an inclusive process, significant changes to health care policy could become law while fulfilling the President's commitment, shared by many in both parties, to universal access to health care.

There will be much activity in Washington, and much to follow, think about and work for with you. Between efforts to influence the content of reform and implementation of payment reforms like bundling, accountable care organizations and other aspects with solid bipartisan support, it will take constant attention to the legislative and regulatory debates here in Washington to inform your strategic planning process and assure a sound foundation for some of the daunting decisions you face.

Happy New Year, and please let us know if we can help you navigate the complicated issues of health reform that face the new Congress and will so affect you.

Nancy L. Johnson
202.508.3432
nljohnson@bakerdonelson.com

After serving 24 years in the U.S. Congress, Nancy Johnson joined Baker Donelson in 2007. She played an integral role in the passage of every major tax, trade and health care initiative during those years and is a powerful advocate on these issues for the Firm's clients.