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## THE LAME DUCK HAS ARRIVED: WHAT TO EXPECT

In the great tradition of American democracy dating back to the election of the First Congress in 1778, voters cast their ballots last week, giving the Republican Party control of the upcoming 114<sup>th</sup> Congress.

In a more recent tradition, campaign yard signs are likely to remain up for months!

President Obama, who began his presidency with a Democratic majority in the Congress, will now round out his last two years in office with a Republican majority. This leaves the upcoming lame duck session as the last opportunity for the president and his Democratic colleagues in the Senate to set the legislative agenda.

### WHAT TO EXPECT FROM CONGRESS

#### Bills Most Likely to Pass

**Fiscal Year 2015 Appropriations:** Before leaving Washington to campaign in late September, with FY15 starting on October 1<sup>st</sup> and no appropriations bills having been finalized, Congress approved a short-term Continuing Resolution (CR) funding the Federal government at Fiscal Year 2014 levels through December 11, 2014. Before the CR expires, the lame duck Congress will pass either: 1) another short-term CR running through February or March 2015; 2) a long-term CR for the remainder of the fiscal year ending on September 30, 2015; or 3) an Omnibus appropriations bill setting new spending levels for FY15. Immediately after the midterm election, President Obama submitted an emergency funding request of \$6.18 billion for the fight against Ebola and will push for its inclusion along with funding to pursue the fight against the Islamic State of Iraq and the Levant (ISIL) in whatever route the Congress takes with FY15 spending.

**National Defense Authorization Act (NDAA):** Considered “must-pass” legislation, Congress has not failed to approve an annual defense bill for more than half a century, so there is every expectation that they will do so again this year. The [Senate Armed Services Committee](#) has approved its bill and it awaits approval by the full Senate, while the full [House approved its bill](#) in May. The House and Senate Armed Services Committees are already pre-conferencing their respective bills to prepare for final action in the lame duck.

The measure may be a vehicle for those in Congress who desire a vote on the use of force against ISIL. At a minimum, the extension of Title X authority to equip and train the rebels in Syria is expected.

**Permanent Internet Tax Freedom Act:** With the ban on internet access tax having been set to expire on November 1<sup>st</sup>, Congress included in the FY15 CR an extension of the ban running through December 15<sup>th</sup>. During the lame duck, Congress is expected to take action to prevent the expiration of the ban on internet taxes. In July, the House approved legislation to make permanent the ban on state and local taxation of internet access and on multiple or discriminatory taxes on electronic commerce. In the Senate, a companion bill has been introduced by Finance Committee Chairman Ron Wyden (D-OR), although that measure has not yet been approved by the committee. During the lame duck, there could be a push by advocates of internet sales tax collections to combine the Internet Tax Freedom Act (ITFA) with the Marketplace Fairness Act (MFA), which deals with collecting and remitting sales taxes for online purchases. The likely vehicle for this effort will be [S. 2609](#), which combines a 10-year extension of the access tax ban with the MFA. However, Chairman Wyden strongly opposes MFA, and there isn't much support for the measure in the House of Representatives where House Speaker John Boehner (R-OH) has said this week that the bill will not move forward in the lame duck. Some observers see a possible compromise on the MFA built largely on a higher tax collection threshold for small businesses, but there is a good chance that Congress will merely act to extend the moratorium and attach that provision to some must-pass legislation such as another CR, without addressing the MFA.

**Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act:** The Senate Finance Committee approved a [two year tax extenders package](#) in April, which would extend certain expired and expiring tax provisions through December 31, 2015. After failing to move in the full Senate because of a disagreement over amendments, Senate Majority Leader Harry Reid (D-NV) has long said that if the EXPIRE Act is taken up this year it will be during the lame duck. The House has taken a different approach, voting to permanently extend a handful of credits as part of "tax reform lite" and preferring to let the rest expire. Chairman Wyden and House Ways and Means Chairman Dave Camp (R-MI), who is retiring at the end of the current congress, have been in discussion about how to address tax extenders, with a one-year extension being the most recently-discussed compromise.

**Terrorism Risk Insurance Act (TRIA) Reauthorization:** The Senate, in July, passed [S. 2244](#), the Terrorism Risk Insurance Program Reauthorization Act. The measure was approved with overwhelming bipartisan support in a vote of 93-4. The House Financial Services Committee approved its version of the bill, [H.R. 4871](#), the TRIA Reform Act, in July and it has been placed on the House calendar. The House bill differentiates between the type of attack – conventional terrorist attacks vs. nuclear, biological, chemical or radiological attacks – and the trigger for tapping the program. In the House bill the trigger for tapping the program following conventional attacks would increase \$100 million per year up to \$500 million, while the trigger following a nuclear, biological, chemical or radiological attack would remain at the current level of \$100 million. The Senate bill, however, makes no change to the trigger regardless of the type of attack.

**Satellite Television Extension and Localism Act (STELA) Reauthorization:** This law expires on December 31, 2014, so reauthorization is a top priority, and could serve as a vehicle for other video related provisions. A reauthorization bill, [H.R. 4572](#), also containing certain video reforms, was approved by the House in July, while the [Senate Judiciary Committee](#) approved a reauthorization bill in June. In September, the Senate Commerce Committee marked up its version of the reauthorization, [S. 2799](#), the Satellite Television Access and Viewer Rights Act (STAVRA), which also contains some reforms to the video marketplace, meaning that all committees of jurisdiction have acted and the reauthorization is poised for action in the lame duck. We expect the minor differences between the House-passed and Senate reported bills to be resolved by early December through ongoing staff negotiations. The resulting vehicle will then likely be attached a House spending bill along with other must-pass items before the end of the year.

### Bills Less Likely to Pass

**Cyber and Surveillance Reform:** In June, the [Senate Homeland Security and Governmental Affairs Committee](#) approved [two cybersecurity measures](#), the National Cybersecurity Communications Integration Center Act and the Federal Information Security Modernization Act. While the bills are bipartisan, final passage is uncertain and could wait until next year. In July, the Senate Intelligence Committee approved [S. 2588](#), the Cybersecurity Information Sharing Act, a bipartisan bill proposed by committee Chairwoman Dianne Feinstein (D-CA) and Ranking Member Saxby Chambliss (R-GA) who is retiring. Introduced by Rep. Jim Sensenbrenner (R-WI), the USA Freedom Act ([H.R. 3361](#)), amending the Foreign Intelligence Service Act of

1978, was approved in the House in May. A companion bill, [S. 2685](#), was introduced by Senator Patrick Leahy (D-VT) and placed on the Senate calendar in July. Despite this legislative activity on cyber, it is probable that this issue will not be addressed during the *Lame Duck*, barring some triggering event. However, Senator Leahy, who serves as Chairman of the Judiciary Committee, is reported to be pushing hard for passage of the USA Freedom Act in the *Lame Duck* before he relinquishes control of the committee in the new congress.

**Sustainable Growth Rate:** The *Lame Duck* offers some hope of passing a permanent solution to the Medicare physician payment formula, also known as the “SGR” or “Doc Fix.” Looking to vehicles such as tax extenders or an omnibus spending bill, Congress still must determine how to pay for reforming the SGR. While stakeholders and experts remain skeptical that such an effort would be successful, lawmakers are pulling out all the stops to engage industry to support a potential SGR fix done this year. However, the current temporary extension of the SGR patch continues through March 2015, meaning that action could slip to next year.

**Russian Sanctions & Support for Ukraine:** Before leaving Washington in late September, the Senate Foreign Relations Committee unanimously [approved](#) the Ukraine Freedom Support Act, which imposes broad sanctions on Russia’s defense, energy, and financial sectors, as well as increasing military and non-military assistance for Ukraine. The bill would provide Ukraine with energy, defense sector, and civil society assistance; establish Ukraine, Moldova, and Georgia as major non-NATO allies; and expand broadcasting programs to counter Russian propaganda in countries of the former Soviet Union. The bill did not pass out of committee in time to be approved by the Senate before they left to campaign. In recent weeks, the business community has raised concerns related to codifying the Russian sanctions in statute, without also including a mechanism to ensure they could be lifted quickly. Further, this past weekend Secretary of State Kerry announced that the U.S. and Russia have agreed to exchange information about the situation on the Russia-Ukraine border, leading many to believe that no further sanctions are imminent. With that said, the bill, or at least pieces of it, could be on the agenda for the *Lame Duck*, including an effort to provide funding in the CR or Omnibus for energy assistance to Ukraine.

**Trade legislation:** The Obama Administration continues to negotiate the [Trans-Pacific Partnership](#) (TPP), a free trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam. Ambassador Michael Froman, the United States Trade Representative, has said that congressional passage of Trade Promotion Authority (TPA) is imperative to a successful conclusion of TPP, as it would enable the Administration to complete negotiations with a stronger hand knowing that the final agreement would go to the Senate for an up-or-down vote with no amendments. TPA [legislation](#) was introduced earlier this year by then-Senator Max Baucus (D-MT), who went on to become the U.S. Ambassador to China. Although USTR had set a goal of completing TPP negotiations by the end of 2014, there is diminishing optimism that the *Lame Duck* will approve TPA legislation leaving both TPA and TPP for action next year. Also possible, but increasingly unlikely, to see action in the *Lame Duck* is the [Miscellaneous Tariff Bill](#) (MTB), which provides duty relief on manufacturing inputs that are not domestically available. The last MTB expired at the end of 2012 when the 112<sup>th</sup> Congress did not pass a renewal. House Ways and Means Committee Chairman Camp introduced the current MTB, [H.R. 2708](#), in July 2013, but the measure has not moved forward in the legislative process. If the bill is not approved in the *Lame Duck*, the House Ways and Means Committee and Senate Finance Committee will need to restart the MTB process next year, vetting duty suspensions for thousands of imported products.

## WHAT TO EXPECT FROM THE ADMINISTRATION

**Net Neutrality:** Stakeholders in the telecommunications and Internet space have been waiting for the FCC to rule on net neutrality rules as a result of the Protecting and Promoting the Open Internet Rulemaking, which has been ongoing since May of this year. Chairman Wheeler’s proposal in May put forth rules that center on the question of whether the Commission should rely on Section 706 authority to enact revised net neutrality rules that comport with the Court’s direction. The Chairman’s proposal also asks whether the Commission should use other authority, such as Title II of the Communications Act (which regulates traditional telephone companies), instead of Section 706. The proceeding has received significant public attention, and the Commission has received over three million comments. Recently, it has come to light that Chairman Wheeler is considering a hybrid approach that would take elements from both Title II and Section 706 authorities. The Chairman and his office are also meeting with interested stakeholders, including Capitol Hill, this week to discuss the proceeding. Many expect the Chairman Wheeler to present the final rules at the FCC’s December Open Commission Meeting, but that may be delayed. On November 10, President Obama released a

statement expressing his desire for the FCC to use Title II authority to enforce net neutrality rules. The President's statement was not received well by industry, and both the FCC and Capitol Hill have mixed responses. The timing of the President's net neutrality statement may contribute to the FCC delaying consideration of final net neutrality rules until the January 2015 Open Commission Meeting. Regardless of whether the Commission deals with net neutrality in December or January, we expect the House E&C Committee to hold hearings on FCC Oversight and net neutrality in the lame duck.

**Immigration:** Last year, the Senate approved [S. 744](#), the Border Security, Economic Opportunity and Immigration Modernization Act of 2013, but the House has declined to act on any comprehensive immigration reform measure. In a press conference the day after the 2014 mid-term election, President Obama talked extensively about immigration reform and his intention to use his executive authority on the matter. In his remarks, President Obama said that any action he takes on immigration, in his view, would and should be superseded by congressional action. However, in laying out their agendas for the new congress, Speaker Boehner and incoming Senate Majority Leader Mitch McConnell (R-KY) did not include immigration reform. Both did say that any executive action by the president on the matter would endanger opportunities for bipartisan cooperation in the new congress.

**Tax Inversion:** Prior to passage of the short-term CR in September, some had thought that the measure could be used as a vehicle for legislation to rein in the practice of corporations moving their headquarters outside the U.S. in order to reduce their tax burden. Several appropriations bills in the House have already had amendments attached that are intended to address the issue, and this issue could still be included in whatever route the Lame Duck takes on FY15 spending, and Chairman Wyden has indicated that he could use the tax extenders package discussed above as a vehicle for addressing tax inversion. A more likely scenario is that the Lame Duck does not act. However, the Treasury Department began taking action on the matter in September with a [notice of actions](#) the department is taking to rein in inversions.

**Authorization for Use of Military Force:** President Obama has indicated that he is planning to submit to Congress an "Authorization for Use of Military Force (AUMF) against the Islamic State of Iraq and the Levant (ISIL)" that is distinct from the "AUMF against Terrorists" signed by President George W. Bush in 2001. Action by the Lame Duck is possible, but unlikely, with the President indicating he will continue his discussions with congressional leaders this year knowing that the AUMF may carry over to the new Congress.

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