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*In this issue:*

## **The “Next New Deal”: Anticipating the Impact of the Obama-Biden Administration on Spiegel & McDiarmid Clients and Friends**

Parallels have been drawn between the circumstances facing President-elect Barack Obama in 2009 and those faced by President Franklin Delano Roosevelt in 1933. FDR's “New Deal” laid much of the foundation of the modern regulatory state, establishing or expanding the Federal Power Act, Natural Gas Act, Federal Communications Act, and Civil Aeronautics Act. Similarly momentous changes appear to be in the offing. Each of our practice groups offers some educated guesses at the scope of those changes, with the understanding that legislative and administrative processes will play a significant role in shaping the final result. Should you have questions about any topic discussed here, you are encouraged to contact any attorney at the firm with whom you regularly do business, or any of the attorneys listed on our website practice area pages:

- ▶ [Energy](#) ([Hydroelectric](#), [Natural Gas](#), [Nuclear](#), [Enforcement](#))
- ▶ [Telecommunications](#)
- ▶ [Climate Change and Environment](#)
- ▶ [Public Transportation](#)
- ▶ [Antitrust](#)

## **Energy**

Among the Nation's many challenges, energy issues will assume greater importance because of their increasingly recognized implications for the economy, the environment, and national security. Simultaneously addressing these issues poses huge challenges that cannot help but spur an increased federal role in the energy sector.

### **Changes at the Federal Energy Regulatory Commission.**

FERC's leadership will change. FERC has five commissioners, of which only three may be of the President's party. Chair Kelliher has announced that he will step down as Chair effective January 20, but will not necessarily leave the Commission until he accepts a new job, recusing himself from Commission business in the meantime where necessary. So long as the fifth seat is still taken by Chair Kelliher, President Obama cannot appoint a

new commissioner and will likely tap a new interim or permanent chair from among the two sitting Democratic Commissioners (Kelly and Wellinghoff). Once Chair Kelliher resigns from the Commission, President Obama will have a vacancy to fill, which may be his nominee for permanent Chair. Once confirmed by the Senate, the new appointment presumably will shift the Commission to a Democratic majority.

### **Transmission Infrastructure and Reliability.**

#### ***There will be substantial efforts to increase investment in transmission infrastructure.***

The President's major energy and environmental goals call for substantial additional transmission capacity. Several major transmission projects are already under consideration, and entities favoring massive transmission construction—including AEP's proposed 765 kV "overlay" across the nation—are making their case. These projects could be funded through transmission rates, but federal grants, loan guarantees, and tax incentives are all possibilities. Some are seeking to include transmission investment as a component of the new Administration's initial stimulus efforts. Senate Majority Leader Reid proposes to give federal power marketing administrations a new mission to build transmission for renewable (and other) resources. The push for increased transmission investment will continue, in our view, and the important questions are how the government will use its funding authority to influence the players, the location of the facilities, and the access rules.

#### ***FERC's role is likely to be enhanced.***

As the Obama Administration takes office, we should expect to hear more about some form of "national grid." Although FERC already has back-stop transmission siting authority, there is continuing pressure to place more siting-related power in federal hands. For example, FERC has sought siting authority for major transmission lines, and there is also interest in giving FERC the power to order the construction of transmission needed for reliability purposes. Alternatively, FERC's back-stop siting authority may be expanded. While states sensitive to intrusion on their traditional powers and others will likely oppose these efforts, the connection between transmission investment and energy and environmental goals creates significant pressure for some action. Draft legislation is already circulating on some of these points, and bills may move very quickly after the stimulus package. There may be a short time during the Congressional negotiations on these issues when parties may try to promote positive changes, especially to remedy FERC's failure to broaden opportunities for all industry sectors to participate in large transmission projects and to promote strong regional planning on fair terms.

### **Demand Side Management and Energy Efficiency.**

The focus on climate change and energy independence will likely lead to increased emphasis on energy efficiency and demand response (load reduction) initiatives, including continued FERC promotion of reforms to allow individual retail customers or third party aggregators to "bid [reductions in] demand" into wholesale generation markets. FERC's initiative encompasses reductions by retail customers served by non-jurisdictional utilities, unless expressly prohibited by law or regulations. Such entities

might consider enacting express prohibitions and developing their own demand response programs to ensure that all ratepayers benefit from the programs.

The Administration also proposes to create jobs by funding energy efficiency audits and building retrofits. However, conservation measures and demand response can threaten utilities' bottom lines. Industry groups are seeking to steer much of the money for such programs to states that have adopted regulatory measures to decouple revenues from megawatts sold. The federal programs may alter rate regulation and the competitive landscape for electric utilities, and local utilities may have to consider pursuit of similar changes for their own rates at the state or local level.

### **Climate Change and Renewables.**

As discussed in further detail in the section of this paper authored by our Climate Change and Environmental Group, the Administration appears committed to early and aggressive legislative action on proposals to address climate change, including efforts to adopt a federal Renewable Portfolio Standard (RPS) and a cap-and-trade mechanism for carbon emissions. The prospect of passage of either or both of these measures has significant implications for the utility industry and the economy as a whole. For utility clients, specific concerns during the legislative and administrative processes will be protecting the value of their existing generation investments and assessing the probable impacts on new investments in renewable or conventional generation resources.

Critical questions will include (1) whether existing resources covered by state or regional RPS or cap-and-trade programs will count under federal programs and for how long, and (2) what types of resources will be classified as renewable for inclusion and credit under federal programs. Any cap-and-trade program must establish a "baseline" level of emissions against which an entity's progress on emissions reduction will be measured, and that will determine when new investments will "count" toward compliance. Your existing generation portfolio will determine how soon your entity might want the baseline to be set. Other concerns include the determination of whether emissions allowances will be allocated or auctioned (or a mixture of both) and the likely impact of such programs on the cost of new resources. Aside from the obvious impact a cap-and-trade program would have on the cost of coal generation, existing RPS programs have tended to increase competition for renewable sites and existing resources and to drive up their costs. Price increases for renewable resources could be particularly critical in areas of the country that do not have many suitable sites for renewables. While an analysis of any utility's position will depend on its unique portfolio and circumstances, such an analysis will be critical for resource decisions in the near term.

### **Water and Hydroelectric.**

Hydropower development will be affected by new federal climate change and renewables policies, but those effects will depend on the specific policies adopted. A carbon tax or cap-and-trade system would likely benefit hydropower development because such projects generally do not produce significant greenhouse gas emissions. A federal RPS, however, might—like some existing state standards—exclude many

hydropower projects from the statutory definition of “renewable generation” because of their effects on river ecology. If so, hydropower would not benefit from federal renewable generation subsidies and credits, or the market price premiums associated with other forms of renewable energy that fall within the statutory definition.

Changing federal policies may increase the economic feasibility of new projects, but existing hydropower permitting and licensing trends seem likely to continue during the new Administration. These trends include:

Non-power uses of hydroelectric project waters (*e.g.*, consumptive and industrial uses) will be increasingly important as competing demands for scarce water grow. FERC is required to balance power and non-power uses in its licensing decisions, so local governments and others interested in drinking water, land use, environmental protection, and recreation may wish to become involved in FERC licensing and relicensing proceedings and related state proceedings to protect their interests, whether as intervenors or as competitors for a nearby project.

National energy policies aimed at reducing carbon emissions will encourage new hydropower development at existing small dams, bringing those facilities within FERC’s exclusive licensing jurisdiction. Localities that rely on such dams and impoundments—for drinking water, recreation, or waterfront development, for example—should be aware that the decision of a private hydropower developer to obtain a FERC hydropower license can trigger federal jurisdiction that transfers the power to make many key decisions about the use of the waterway to FERC.

FERC will likely continue its current policy of seeking to encourage the development of hydrokinetic projects—hydropower projects that harness the energy of waves, tides, or instream-flow, rather than falling water—by granting preliminary permits and exclusive federal licenses to potential developers with unproven or only partially-developed technologies. Although FERC recently approved the first installation of a hydrokinetic device at an existing FERC-licensed hydroelectric project (two 35 kW turbines in the tailrace of a conventional Mississippi River hydropower project in Minnesota), this policy has not yet resulted in significant hydrokinetic development. The Obama Administration’s strong commitment to renewable energy, however, should result in increased federal funding for basic research on hydrokinetic technology that could significantly accelerate the pace of technological innovation and project development.

## **Nuclear Power.**

During the past Administration, the Nuclear Regulatory Commission had to add staff to deal with license applications for at least 25 new units at 17 existing or new sites. Nuclear power’s potential as a source of new domestic power supply depends on the new Administration’s choices on climate change issues and ways to strengthen the economy. Long lead times from licensing to commercial operation require starting now if new plants are to be completed by 2020. While high costs are likely to deter small entities from becoming prime nuclear plant sponsors, they should have the option to participate in such projects where it is in their interests to do so. The need for local environmental or

political support has sometimes caused project sponsors to allow municipal or cooperative utilities to participate in project ownership, and we expect this to continue to be the case. An individual system contemplating joint participation needs to consider issues like adequacy of insurance coverage, performance and financial guarantees and, ultimately, decommissioning and spent-fuel disposal responsibility. Also, if new nuclear plants are to be constructed in areas with organized markets, market-design changes may be needed to make power-delivery costs more predictable.

### **Natural Gas.**

While the new Administration's support for off-shore drilling has been limited, it will likely support increased land-based natural gas production. Natural gas will be an attractive near-term approach to greenhouse gas reduction because it emits less carbon dioxide per BTU than coal.

With the recession slackening demand, and major new domestic gas resources and gas import infrastructure in development, natural gas prices and futures are down substantially. This reduction may slow the immediate development of new but more expensive natural gas sources (including Liquefied Natural Gas and offshore sources and new domestic resources), but may increase existing uses of natural gas.

Although natural gas pipeline construction is receiving less public attention than is the potential for new electric transmission lines, natural gas projects may be able to capture some economic recovery funds. We expect a similar (if more muted) focus on natural gas infrastructure improvement and a national pipeline grid that is more accessible to users. FERC's policies encouraging use of pipelines at high capacity factors, such as its efforts to encourage secondary pipeline capacity markets, are also likely to continue.

### **Enforcement.**

With varying levels of enthusiasm, FERC and NERC (the North American Electric Reliability Corporation) have accepted the enforcement roles assigned to them by Congress. FERC's initial foray has been steady, with a concerted focus on tariff violations and moderate penalties. FERC has asserted that more significant penalties might be imposed, but has yet to impose them. NERC has avoided the worst of the "bad guy" role but faces a huge back-log in its processing of violations. Neither has embraced its new role with fervor, and, barring another meltdown or Enron-type situation, we expect that to continue. The new Administration is likely to continue FERC's efforts to ensure that NERC moves forward on enforcing compliance with existing reliability and cyber-security standards and developing new ones. In addition, we expect renewed efforts to enact legislation to expand FERC and/or DOE's authority to issue directives to utilities in response to cyber-security and potentially broader national security threats.

#### ***Enforcement will occur behind closed doors.***

Although the President's general orientation is towards increased enforcement *and* increased transparency, it is not clear whether FERC's Office of Enforcement will embrace

that orientation or will continue to rely on its prosecutorial discretion in attempting to settle enforcement matters behind closed doors. We see little institutional interest in a transparent process at FERC, though the Courts of Appeals will at some point be called on to review the agency's enforcement approach.

***Having a good compliance and training program will be critical to protecting your utility.***

Whether FERC imposes penalties in a given instance often turns on whether the organization has a "culture of compliance," words well-loved by FERC, NERC, and its regional entities. There is an increasing premium on demonstrable, documented compliance programs, policies, and training. In the reliability context, where potential penalties can add up very quickly, smaller systems challenged to adapt to EPart's mandates can accrue significant exposure. To protect against such penalties, utility systems will need sound compliance policies, regular training, and thorough documentation of all compliance-related activities.

## **Telecommunications**

### **Federal Communications Commission Transition.**

The FCC is a five-member body, with no more than three from one political party. The FCC is now down to four members, however, and will likely be down to three by January 21. Commissioner Tate's term ended when the new Congress convened at the beginning of January. Chair Martin could remain as a member after President Obama selects a new interim Chair, but outgoing Chairs have not done so.

President Obama likely will appoint either Commissioner Copps or Commissioner Adelstein, the two sitting Democratic FCC members, as interim FCC Chair. Designating a sitting FCC member as Chair does not require Senate confirmation. It may take several months before the additional FCC vacancies can be filled and the nominees confirmed. The result could be a three-member FCC, controlled 2-1 by Democrats, but probably only for a short time.

The Obama Transition Team includes several individuals with Clinton-era FCC ties, as well as "new blood" in the form of FCC Transition Team leaders Susan Crawford, a University of Michigan Law School professor, and Kevin Werbach, a University of Pennsylvania Wharton School professor, both of whom are strong advocates of more "open" broadband networks. According to many sources, Julius Genachowski, a close associate of Obama and active in his campaign, will be the new FCC Chair. Obama likely will also install a new cabinet-level Chief Technology Officer to oversee a more transparent, Internet-friendly federal government and to promote broadband.

**Obama Administration Communications-Related Priorities.**

Broadband development will be an Obama Administration priority, as it helps to achieve other Administration objectives. Broadband development promotes job growth in the near term and, in the longer-term, provides a national infrastructure that is more energy efficient, increases our global competitiveness, and reduces the need for carbon-emitting transport.

While the Bush Administration took a largely hands-off, let-the-market-work approach, we anticipate that the Obama Administration will be far more proactive. It will also be much more receptive to the interests of Silicon Valley. (While an oversimplification, think of the Bush FCC as pro-AT&T and pro-Verizon, while the Obama FCC will likely be more pro-Google.) We are also likely to see more progressive policies in the field of mass media regulation.

***Broadband Deployment.***

Promoting universal broadband deployment will be the new Administration's number one telecommunications policy goal. Obama representatives have been among the leading critics of the Nation's poor global standing in ultra high-speed broadband deployment and its relatively high prices for relatively slow broadband speeds.

Broadband deployment will be pursued through multiple avenues. While the details are a work in progress, we anticipate that the most immediate step to promote broadband deployment will be its inclusion in the infrastructure component of economic stimulus legislation. The legislation might contain a combination of broadband infrastructure funding options, including: (a) direct federal grants to states and localities; (b) the creation of a national infrastructure bank from which low-cost loans may be procured; and (c) broadband construction and deployment tax credits or other tax incentives. The first two of these three approaches would be most useful to interested municipalities and municipal utilities, as the tax incentive approach would likely benefit only private sector providers.

Separately, the FCC will likely develop nationwide broadband mapping requirements, set increased broadband speed-level objectives, and revise and expand existing telephone universal service fund mechanisms to subsidize broadband service to rural and other high-cost areas. The FCC presumably will also pursue measures to increase spectrum-use efficiency and expand wireless broadband availability.

***Network Neutrality.***

The current FCC, upheld by the courts, has ruled that broadband services are an "information service" rather than a "telecommunications service" and thus are not subject to any common carrier obligation to make service available to all on non-discriminatory rates, terms, and conditions. This has prompted concern that large broadband providers—especially incumbent telephone companies and cable

operators—could discriminate in the rates, bandwidth, or priority given to different Internet service providers, applications, or users, or that they could block or degrade content or applications that they deem to be a competitive threat. In response, “net neutrality” proponents have argued that broadband should be subject to a “common carrier lite” obligation not to discriminate unreasonably. The Obama team is dominated by “net neutrality” proponents. You can therefore expect an Obama FCC to press more vigorously for net neutrality requirements under existing law and, if that effort is overturned by the courts, for Congress to enact net neutrality legislation.

#### ***Public Safety Communications.***

For homeland security reasons, the Obama Administration is likely to continue efforts to create a nationwide, interoperable public safety network. One key task remaining at the end of the Bush Administration is the allocation of a portion of the 700 MHz “D Block” spectrum for such a network. The current FCC proposes to auction the spectrum to the private sector, with the winning bidder(s) required to build a network that will be available for both public safety and commercial use. Some major cities have argued that the spectrum should be allocated directly to public safety users. This is an issue that the Obama FCC, and perhaps the new Congress, may have to resolve.

#### ***Consumer Protection.***

The Obama FCC, as well as the new Congress, will take a more proactive role in adopting and enforcing measures to protect telecommunications consumers. Examples include reining in wireless and landline early termination fees and requiring fuller disclosure of service limitations and fees.

#### ***Mass Media (Broadcast and Cable).***

The transition of all television stations from analog to digital television (“DTV”) is currently scheduled to occur on February 17, 2009. While policy issues relating to the DTV transition are largely settled, the Obama Administration faces the difficult task of effectuating implementation. There is concern that insufficient resources have been devoted to preparing the public for the DTV transition. You can expect efforts by the Obama Administration to secure additional funding, to ask the broadcasting industry to contribute more of its own resources to easing the transition for viewers, and to push the deadline beyond February 17.

The Obama FCC also is likely to take a more proactive posture promoting diversity in media ownership and localism in programming. The Obama FCC’s localism and diversity policies also might prompt renewed interest in protecting local public, educational, and governmental (“PEG”) access channels on cable systems. The new Administration will, at a minimum, halt the current FCC’s march to relaxing ownership restrictions on broadcast and cable and, in some areas, may reverse the trend entirely. An Obama FCC would likely rely on a more robust interpretation of the “public interest” obligations of TV and radio broadcasters to achieve these

objectives. More vigorous antitrust enforcement by the Department of Justice and/or the FTC is also a possibility. Large economic downturns, however, inevitably tend to result in increasing industry consolidation, and this reality may be an obstacle to reducing industry concentration levels.

## Climate Change and Environment

President Obama's nominees to key leadership posts—Carol Browner (energy and climate “czar”), Lisa Jackson (EPA), Nancy Sutley (Council on Environmental Quality), and Nobel Laureate Steven Chu (Secretary of Energy)—evidence his intention to follow through on campaign promises to combat global warming and support energy innovation. However, economic realities may require the Administration to move first on those portions of its environmental agenda that promise economic stimulation and job creation.

### **A Federal Renewable Portfolio Standard (RPS) may be adopted.**

Because a federal RPS can be viewed both as a tool for stimulating green economic development and as a way to decrease carbon emissions before implementing a cap-and-trade program, an RPS may be included in quickly-enacted economic stimulus or energy policy legislation. Although President Obama has proposed a renewable purchase requirement of 25% by 2025, a mandate closer to 15% is more likely to be passed. A federal RPS probably would not preempt more stringent state RPS mandates, at least initially, but in the long run a single, federally determined RPS probably will emerge. RPS can be expected to increase power supply costs, especially in regions without plentiful renewable resources.

### **There will be early and aggressive action on climate change legislation, but the details will take time.**

The new Administration and Congressional leadership are expected to pursue legislation aggressively as early as spring 2009 to curb greenhouse gas emissions through a cap-and-trade regime. A desire to participate actively in international climate change efforts will reinforce these efforts. Initial proposals outlined during the campaign and by Congressional leaders would require reduction of emissions to 1990 levels by 2020 and to 80% below that by 2050. Most early proposals call for an auction (rather than a free allocation) of allowances, with auction revenues used to promote green technology and to reduce cost impacts on consumers.

We expect initial proposals to be moderated in the legislative or administrative process. In the end, given the cost of auctioned allowances, some combination of an auction and allocation is likely. To further ease cost impacts, final emissions mandates and early-year targets are likely to be relaxed, while a price cap or some other “safety valve” may be included. Presumably, a federal cap-and-trade program would preempt state and regional climate change initiatives, although allowances already purchased or

offsets certified under those programs may be grandfathered. Considerable debate will occur over which agencies (CFTC, SEC, FERC, EPA, or some combination thereof) will oversee the carbon market.

Alternate plans (such as a carbon tax) may emerge, particularly in light of concerns that cap-and-trade has not been effective where it has been tried and that market mechanisms offer less financial predictability than a tax. However, the political difficulties of instituting a carbon tax remain daunting, although the electric utility industry (through EEI) has signaled that it prefers a carbon tax approach to cap-and-trade.

Potential regulation of greenhouse gases under the existing Clean Air Act (CAA), which business groups strongly oppose, may give the new Administration leverage in pursuing its legislative initiatives. CAA regulation also may serve as a fallback if Congressional action stalls or as a means to address sources (such as automobiles) not covered by a cap-and-trade regime.

## Public Transportation

### Timing of Decisions on Major Transportation Policies.

Public transportation issues during the Obama Administration will be addressed in two waves: in the economic stimulus legislation that will fund "shovel ready" infrastructure projects and later in reauthorization legislation for aviation and surface transportation programs.

Public agencies will be impacted by the new Administration's decisions on major transport policy issues either as transportation operating agencies or as public users of transportation services and facilities. The first task for DOT Secretary-designate Ray LaHood, the recently retired Republican congressman from Illinois, will be to help shepherd the Obama Administration's economic stimulus program with maximum bipartisan support. This legislation is intended to help kick-start economic recovery by funding from general tax funds and not federal user taxes hundreds of airport, highway, mass transit, and other civil infrastructure projects that can be started within 90-120 days.

The levels of federal funding in the proposed economic stimulus are expected to approximate two years of regular transportation appropriations and should accordingly reduce pressures for early Congressional enactment of programmatic changes for Federal Aviation Administration (FAA), Federal Highway Administration (FHA) and Federal Transit Administration (FTA) programs which are part of multi-year reauthorization bills. This will give the new LaHood team some breathing room to develop different solutions than those offered by the outgoing Administration for public transportation's intractable problems: a dearth of federal user funds to support construction of new air and surface transportation capacity; and ongoing debates about whether system users should pay user charges based on actual use (tolls, user fees, congestion pricing) rather than through federal gas/fuel taxes that

are less directly related to system use; and whether public transportation facilities can be financed and operated by private entities with private debt without complete loss of public control.

### **Likely Obama Administration Policies by Transportation Mode.**

#### ***Air transport and public airports.***

**Obama Administration policies will have to recognize that U. S. airline financial losses have resulted in reduced air service to communities and decreased capital development at public airports.**

At the time of President Obama's inauguration, the state of U.S. civil aviation is not good. Spikes in fuel costs in 2008 up to \$150 a barrel caused U.S. legacy airlines to shed even more employees and to reduce seat capacity in their domestic route system by 12-15%, which resulted in the shrinking of scheduled air service at most of the nation's air carrier airports. Some 75 of the 500 airline-certified U.S. airports reportedly lost all scheduled air service. Although the large recent drop in fuel costs helped staunch the industry's flow of red ink temporarily, a second major factor – the world's economic recession – has reduced both business and leisure passenger totals during the last quarter of 2008. The U.S. airline industry estimates it will lose \$4 billion for 2008.

Smaller U.S. communities have particularly suffered the loss of scheduled air service. The Obama Administration and the new Congress will have to consider revamping the Essential Air Service program, which subsidizes daily roundtrips on low-capacity turbo-prop aircraft to the nearest hub airport from smaller communities that had some air service back in 1978 when the Airline Deregulation Act was enacted. That airline subsidy program of up to \$200 per passenger is thought by DOT professionals and by EAS-served communities alike to be "broken", but Congress has feared eliminating subsidized air service for its rural constituencies. However, the large number of U.S. communities recently losing air service because of legacy airline cutbacks will force the Obama Administration and Congress to look again at this dated program and perhaps to consider alternatives that may include a funding requirement on state or local governments to match the Federal share of any air service subsidy.

Capital development budgets at U.S. publicly owned commercial airports mirror airline industry financial trends. In light of fewer flights and passengers, many U.S. commercial airports have reduced their capital budgets by 25% or more for 2009; some have even revised their operating budgets to offer reduced landing fees to airlines in an effort to retain quality air service for their communities. The immediate effect is that each contractual business deal with airlines and other airport tenants is being closely scrutinized in search of economic efficiencies.

**Congressional reauthorization of FAA programs will focus debate in 2009-2010 on the cost sharing formulas for airline and general aviation use of federal airways and on funding options for local airports.**

Beyond the economic stimulus bill, U.S. airports want the new 111<sup>th</sup> Congress to enact an FAA Reauthorization Bill. The last such reauthorization law, which sets funding levels and policies for four-year periods for FAA programs, expired in 2008 and has been temporarily extended by Congress through March 2009. Although the House of Representatives passed its version of a long-term extension in 2008, the Senate's measure never achieved the 60 votes needed to begin Senate floor debate.

DOT Secretary-designate LaHood and his team will have to confront the major aviation user funding problem in the FAA Reauthorization package that precluded Congressional compromise last year: whether the operators of multi-engine general aviation (non-airline, non-military) aircraft will have to pay an increasing share of the Federal user taxes or fees that flow into the Aviation Trust Fund to pay for FAA programs so that the scheduled airlines and their passengers do not cross-subsidize private flyers. We anticipate that the Obama Administration will favor the U.S. House of Representatives' past approach – to increase current jet fuel taxes on general aviation and to avoid the FAA-administered user fee approach for greater cost recovery that is favored by the U.S. airlines. General aviation's political power in Congress will likely cause the Obama team to get additional federal user tax revenue any way it can, without regard to detailed cost-benefit analysis.

Finally, the FAA's air traffic control system needs to be modernized – at huge cost. While today's passenger cars have access to GPS technology, FAA's current ATC system does not. The federal government's plan to upgrade the airways system ("NextGen") to benefit from GPS technology and to provide additional capacity around major airports is not likely to be completed until 2020 – if funding sources can be found. The Obama Administration may determine that, with an existing trillion dollar budgetary deficit and the anticipated additional cost of its economic stimulus plan, it cannot also afford to subsidize airways modernization with general tax dollars. Substantial industry funding is problematic at best.

**DOT's continuing aviation regulatory agenda for the Obama Administration years is complex, whether or not Congress intervenes.**

Official Washington has been debating since 1969 how access to the nation's busiest airports should be allocated among competing airlines when demand for "airport slots" exceeds available runway and/or airspace capacity. Most recently, the Bush Administration proposed that, in lieu of the traditional FAA role of negotiating flight reductions with airlines (with competition and antitrust implications), slots at over-capacity airports (initially at the congested New York-area airports) should be allocated by slot auctioning, a market mechanism that would free the FAA from making tough allocative decisions. After receiving briefs in

opposition from U.S. and international airlines, airports, and their trade associations, a federal court recently enjoined FAA from going ahead with DOT's reallocation scheme. The Obama Administration will likely withdraw the Bush Administration's plan, avoiding a confrontation in the courts, but the underlying problem will then return to DOT's regulatory docket with no easy alternative solution apparent.

### ***Surface Transportation.***

**The Highway Trust Fund isn't generating sufficient federal user tax revenues to fund currently-authorized highway, bridge, and mass transit program costs, much less increases for future years.**

The Highway Trust Fund took in \$31 billion in revenue (primarily federal gas tax receipts) in FY'2008, \$3 billion less than in the prior year, while federal surface transportation spending increased by \$2 billion. September 2008 was the eleventh straight month of declining driving, representing 90 billion fewer miles driven than in the same eleven months of the prior year.

The Bush Administration has recommended that Congress fundamentally change the nation's approach to financing and managing surface transportation systems from reliance upon a set cents-per gallon federal gas tax (which doesn't increase with the cost of gas) to direct user charges (toll fees, congestion pricing) for those who use federally-funded facilities. Also, a greater role for public private partnerships for highway construction was proposed so that private funds could substitute in the future for (politically unavailable) higher levels of federal user taxes. The Bush DOT also criticized the last surface transportation reauthorization law for including more than 6,500 Congressionally-earmarked projects, up from 10 earmarked projects as recently as 1982.

The current surface transportation authorization law expires on September 30, 2009, although early enactment of an economic stimulus package with high levels of expected investment in highway, bridge, and mass transit projects could lessen pressures on the Obama Administration to produce draft surface reauthorization legislation any time soon.

Mass transit agencies hope that the new Congress will increase funding for rail and bus systems (beyond their traditional 15% of federal fuel tax revenues) since public transportation also advances other Obama Administration objectives (less road congestion, cleaner air, reduction of greenhouse gas emissions). Unfortunately, much of the \$12.2 billion in public transit projects that are "ready to go" within 90 days of federal funding involve purchases of new railcars that aren't manufactured within the U.S. and that would take five years from ordering to entry into revenue service.

Some transit agencies are also urging Congress to enact a provision for federal guarantees of payments on lease-back financing deals that those agencies used in the 1990s to pay for trains, buses, and other equipment. They "sold" their newly purchased rolling stock to banks that could then deduct depreciation payments

from their taxes and “leased back” the equipment to the transit agencies. Adequacy of lease payments was guaranteed by the AIG insurance group until its federal takeover when those deals fell into technical default. Senate Finance Committee leadership appears opposed, with its chair commenting that “Deliberately involving the U.S. Government in a tax shelter scam would add fuel to that fire.” The House Ways and Means Committee is expected to be more sympathetic to the transit agencies’ pleas.

**Substantial changes to the structure of today’s highway/transit statute are widely expected; Obama Administration views are not yet clear since higher fuel taxes would run counter to its economic stimulus program.**

As noted above, the Obama Administration’s views are not yet clear since higher federal gas taxes – for whatever purpose – would counter the hoped-for benefits from the economic stimulus legislation. At minimum, there’s a growing consensus that the upcoming highway/mass transit reauthorization legislation must incorporate substantial structural changes to current law: fewer discrete categories of grants; fewer Congressional earmarks; accelerated environmental review processes for even controversial projects; and, equally highly controversial, proportionally greater investment in highway development in urban areas than in rural areas.

## Antitrust

The Administration’s anticipated focus on energy resource development probably means little immediately visible change in antitrust policy or enforcement in the energy area, but market power issues and the potential for market manipulation will have to be addressed in any cap-and-trade program.

Presently, utility-owned electric generators are in relatively good financial shape, while many independently-owned generators are struggling financially, making them attractive acquisition targets. Hedge funds have started to acquire generation interests, and, over the long-term, we expect expanding financial sector involvement in electric generation. Because most of the energy and financial sectors are already subject to some kinds of regulation, antitrust issues are likely to occur in that regulatory context, as opposed to third party suits brought on antitrust grounds. Smaller entities may wish to participate in regulatory merger and market-based rate proceedings to highlight any anticompetitive impacts they see in the proposals.

More generally, outside the energy context, the economic downturn is likely to result in increased merger and consolidation activity in many sectors, and that may lead to an emphasis on behavioral remedies and rules to combat exercises of market power rather than structural remedies. Also, to the extent that agency regulatory authority over particular industries increases, efforts to protect against anticompetitive practices may shift away from private antitrust lawsuits and towards those regulatory agencies.

*SPIEGEL & MCDIARMID LLP*

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- ▶ *In any technical area, lawyers should be conversant with more than just the fine points of the law. We must be able to communicate effectively with clients, expert witnesses, judges, and others about highly technical matters.*
- ▶ *Our clients are entitled to lawyers who approach problems with a broad perspective. Narrow thinking leads to narrow solutions, and narrow solutions are usually poor solutions.*