Introduction

There is little doubt the 2014 Mid-Term elections will be described by historians as a “wave election” and Republican candidates rode that wave to significant victories on election night. The question is whether President Barack Obama and the Republican Congress can resolve key issues such as immigration reform, tax reform, minimum wage and the reconsideration of federal marijuana laws.

We think there may be an opportunity for the President and the Congress to work together. Most Presidents, in their last two years in office, become concerned about their legacy. President Bill Clinton, in his last two years, began to “triangulate” on policies in an effort to reach compromises with the Republican Congress. It was then that he announced to the nation, “The era of big government is over.” President Clinton said after the Republican takeover of the Congress in 1994:

As you know, for some time, I've been working with Republicans and Democrats in Congress to forge a balanced budget that protects our values. Though significant differences remain between our two plans, Republicans and I have enough ... in common ... to provide a modest tax cut without devastating Medicare, Medicaid, education, and the environment and without raising taxes on working families. So, again,... I asked Congress to join with me to make the cuts we agree on. Let's give the American people again... the brighter hope for the future... (that our agreement)... will bring.

Whether President Obama can or will follow suit and the Republican response remains to be seen. If the President is consistent with his past behavior, he may be ready to act unilaterally through executive orders or rule makings that are underway or being contemplated. Taking a less conciliatory stance, which might be early posturing, President Obama said at his recent press conference that the new Congress will pass legislation that he may or may not sign. He said:

... Congress will pass some bills I cannot sign. I'm pretty sure I'll take some actions that some in Congress will not like.

Understandably, Republicans were jubilant after winning control of the Senate, but if the victory is to mean anything come 2016, the hard part begins now. The election provided real encouragement for Republicans. The most significant victories in the Senate races, in Iowa and Colorado, and in the gubernatorial elections, in Florida, Illinois, Maine, Maryland, Ohio and Wisconsin, were in swing states that President Obama won in 2008 and 2012. Still, many say the road to the White House remains difficult for the Republicans given America's demographic realities.

We think that going forward, the Republicans will have to show that they can govern. After controlling only the House of Representatives, they will control both chambers and they will have to change their obstructionist image to one that can pass legislation. To do so, they will have to reach across the aisle, identify issues where both parties share an interest and pass bills that the President can sign.

On their own, the Republicans do not have the 67 votes necessary to override a presidential veto. There will probably be 54 Republicans seated when Senator Mitch McConnell (R-KY) becomes Majority Leader. He will need 60 votes to pass major legislation. Interestingly, there are six Democrats from red or purple states that may work with the Republicans on key issues. In fact, there might even be a seventh Democratic Senator who might consider doing the same. The list...
includes Senators Joe Donnelly (D-IN), Angus King (I-ME), Claire McCaskill (D-MO), Jon Tester (D-MT), Heidi Heitkamp (D-ND) and Joe Manchin (D-WV). Because of the closeness of the Virginia election, the Republicans also may consider approaching Senator Mark Warner on specific issues, such as easing the impact of the sequester on military spending.

We think the conservative wing of the Republican Party may require the leadership, especially in the House of Representatives, to send the President bills that they know the President will veto, such as abolition of the Affordable Care Act (Obamacare). After passing a number of these ideologically motivated pieces of legislation, which show their base that they tried to accomplish the changes reflected in their campaign communication, the Republicans could offer more conciliatory legislation that the President might sign.

Like his predecessors, Presidents Ronald Reagan, Clinton and George W. Bush (43), the last three presidents to serve for two terms, President Obama has an opportunity to work with the Republicans and enact significant legislation during the last two years of his Presidency. He can work with the Congress to achieve Trade Promotion Authority that the Administration believes it needs to conclude trade agreements with countries in Europe and the Far East. Interestingly, the President has wanted to obtain this authority for some time and it was Senator Harry Reid who blocked it because of AFL-CIO opposition.

We think possible compromises could be reached on issues like fundamental tax reform, perhaps all or part of immigration and parts of Obamacare. Compromises also can be achieved on lifting the funding caps (sequester) for selected military programs, among others. If the Congress and the President agree, additional federal funding could be provided to the military to meet readiness requirements that will enable the United States to fight ISIL more effectively. Additionally, increasing the availability of related government contracting opportunities would provide an economic stimulus domestically with jobs for civilian workers in the private sector. All of this could prove beneficial to both political parties because it allows them to respond favorably to base voters who support their respective political ideologies on the need for economic stimulus programs or to improve military preparedness.

What are the possibilities of achieving something during the Lame Duck Session?

The congressional working periods between mid-November and early January of even numbered years following a presidential or congressional election are generally described as “lame duck” sessions. Since the advent of the Twentieth Amendment to the Constitution in 1933, which moved the start date of a new Congress from March to January, the Congress has convened 19 lame duck sessions. During a lame duck session, members from the old Congress return to Washington to do legislative business even though many of them have either retired or were defeated in their bid for re-election.

Even though unlikely, the lame duck session could provide an opportunity to address some of the issues that Congress avoided in the first part of the 113th session.

However, Senators Ted Cruz (R-TX) and Mike Lee (R-UT) have asserted in a letter to Senator Reid that they would object to any Democratic initiative that tries to advance any non-emergency bills before January. They said, “Planning to reconvene the Senate in a lame-duck session to address major new legislation would subvert the will of the American people, lessen accountability and do lasting damage to the dignity of this body’s proceedings.”

Senator Reid seems willing to go along with this. He says that these kinds of pending issues might cause additional acrimony between the parties. While the Republicans lack the votes to overcome a presidential veto or defeat a filibuster, any changes in the Senate rules require only a simple majority vote. In November 2013, Senator Reid
employed what is commonly described as the “nuclear option” and changed the rules to allow a simple majority vote to confirm presidential nominees for the executive and judicial branches, inciting the Republicans for what they consider a power grab that eliminated their right to filibuster the Senate’s approval of the President’s nominees.

Senator McConnell has said that he supports a return to the regular order that existed prior to the exercise of the nuclear option. He envisions a more open floor with Senators and both parties able to offer amendments. He says the committees will have more authority to advance legislation. Most important, however, while not committing to reversing the rule limiting the filibuster, he said, “The Senate can be returned to the place of great debates, contentious debates but where you can still get outcomes on things where you have at least 60 Senators.” We think it appears increasingly unlikely many of the President’s nominees for the judiciary will be confirmed during the lame duck session.

We expect the Congress will send the President a completed Defense Authorization Bill that may lift portions of the defense sequester and provide for greater contracting opportunities. Congress will have to extend the provision of the Terrorism Risk Insurance Act, which expires in January and therefore needs to be reauthorized.

Another task for the lame duck session is to avoid another government shutdown. Congress must pass either an omnibus appropriations bill or another continuing resolution to keep the government operating through early 2015. If Congress passes an omnibus appropriations bill, there may be opportunities, though remote, for Republicans to attach legislative riders that, in effect, limit government spending for specific Administration programs. It is hoped that they will be able to pass a Continuing Resolution to keep federal spending at 2015 levels plus 10 percent and fund the government for some time after the submission of President Obama’s 2016 budget and the delivery of his penultimate State of the Union address.

Immigration and other issues may be considered. On the day after the elections, the President reiterated his intention to deal with immigration by executive order, which received a caustic response from Speaker John Boehner. Also, there may be discussion on consideration by Congress’ on the decision to escalate military operations against ISIL and the Administration’s response to issues relating to containing the spread of Ebola. Also, a measure to approve the long-delayed Keystone XL pipeline may come to a vote to boost Democratic Louisiana Senator Mary Landrieu (D-LA) in her December runoff election. Despite any political motivation for doing it, the Republicans would be hard-pressed to oppose the legislation.

Since the lame duck session may last only about 15 congressional work days, despite the opportunities, and barring a catastrophic event, we think this lame duck session will not accomplish much of significance. More than likely, Congress will delay any action on important legislation and oversight until after the 114th Congress is convened.

Expectations from the 114th Congress

The Federal Budget Process

The Federal Budget Process is a complex series of disparate processes, evolving separately, that must be coordinated to provide a framework that permits the Executive Branch to manage and pay for federal expenditures. These processes include the President’s budget submission, the budget resolution, reconciliation, sequestrations, authorizations and appropriations.

In describing the methods by which the federal government allocates its resources, observers usually start by saying the Constitution grants the “power of the purse” to the Congress. They refer to Article I, Section 9, which says, “No money
shall be drawn from the Treasury, but in the form of Appropriations made by law.” However, the Constitution does not say how Congress will administer this responsibility.

Over the years, Congress passed laws that require the President annually to submit a proposed budget for the federal government by the first Monday in February and for Congress to annually adopt a concurrent resolution on the budget outlining Congress’ revenue anticipations and the kinds and amounts of expenditures it wants undertaken during the next fiscal year. In other words, the budget process to be considered by the new Congress beginning January will affect federal programs in 2016.

One of the first financial issues for the 114th Congress will be to address the fact that the federal government spends more than it takes in. When expenditures exceed revenues, the Treasury Department is required to issue bonds to make up the deficit. However, Treasury cannot issue new debt beyond previously established congressional debt limits. Hence, Congress periodically is required to raise the debt limit. This requirement gave rise to the debt ceiling debate that resulted in the 2011 shutdown of the federal government.

In February 2014, the Congress extended the debt limit to May 15, 2015. Bureaucratic maneuverings may allow the federal government to continue operating for a short time after that date. However, a fight over the debt limit may set the tone as to how well the President and the new Congress can work together. Previous discussions on the reduction of federal spending and its impact on expenditures that support the Administration’s use of its federal regulatory authority, the President’s use of executive orders, domestic and military spending, as well as negative impact of further increasing the debt, will become part of the debate that will help determine whether anything can be achieved by the 114th Congress.

The problems for the new Republican majority may be exacerbated as a result of differing approaches to federal spending among individual members of the House and Senate Republican caucuses. For example, there are Republican members, some of whom may become committee chairmen, who do not see a political benefit in compromising with the President on budgetary issues or anything else; instead, favoring fairly draconian legislation that will use the budget process to cut out federal funding for the Affordable Care Act, any Administration effort to address Immigration Reform unilaterally, the Department of Education, the Environmental Protection Agency and other federal program they find repugnant.

After Watergate, Congress passed the 1974 Budget Act. It provided for an optional “reconciliation” budget process. Reconciliation bills could be created by “reconciliation instructions” that might be included in the annual budget resolution Congress is required to enact. Both of these budget initiatives were created as fast-track measures because they are immune from filibusters and require a simple majority vote for passage.

The reconciliation bill was intended to allow Congress, at the end of the year, to adjust federal spending or revenue legislation during the year to take account of economic developments and bring the effects into alignment with the budget guidelines Congress had adopted. But unanticipated consequences often arise after the passage of any legislation. The reconciliation process was last used by the Democrats to pass the Affordable Care Act. The use of the reconciliation process affords the Republicans a chance to bypass Senate rules, which require 60 votes to pass legislation, to send bills to the President’s desk. However, the approach could be ineffectual in the long-term because the Republicans lack the two-thirds majority to override a Presidential veto.

**Anticipated Changes in Senate Leadership**

As the Republicans take control of the Senate, establishment Republicans are about to pick up the chairman’s gavel, setting up a classic conflict between governing and campaigning with the party’s White House-aspiring young guns (such as Senators Ted Cruz, Rand Paul and Marco Rubio). On everything from foreign aid and military funding to how to undermine Obamacare, Republicans are just as likely to clash with each other as with President Barack Obama. Younger
conservatives hope to pass bold conservative blueprints on such core issues as health care and taxes, even if they face a presidential veto. Committee chairmen appear to believe that governing requires sometimes putting the possible ahead of the ideal.

Senator Thad Cochran (R-MS) will become Chairman of the Appropriations Committee. We think Senator Cochran is well-placed to help the new Republican majority if he can find common ground with Democrats on big spending bills and controversial amendments. His top priorities are funding the government through the end of the 2015 fiscal year; emergency money for Ebola, ISIL and other fast-unfolding world events; and curtailing fiscal year 2016 spending. A Republican majority, however, is no guarantee haggling over fiscal issues will cease.

Senator Jeff Sessions (R-AL) likely will become Chairman of the Budget Committee. (He could be bumped by Senator Mike Enzi (R-WY), who outranks him on the panel. An Enzi spokesman said the Wyoming Republican is considering his options.) If Senator Sessions becomes Chair, it would give one of the Senate's most conservative members the power to change budgeting rules to make it easier to enact Republicans' agenda. He is a strong supporter of using reconciliation to pass legislation and opposed last year's bipartisan deal to put sequestration on hold for two years.

Senator Lamar Alexander (R-TN) will become Chairman of the Health, Education, Labor and Pensions (HELP) Committee. Among other things, this committee is responsible for measures relating to education labor, health and public welfare including occupation safety and health, as well as the welfare of miners and the administration of Obamacare. Senator Alexander has made no secret of his disdain for No Child Left Behind, Obamacare and the activist National Labor Relations Board. He is expected to use his chairmanship to schedule oversight hearings on Obamacare and to use his ability to call and even subpoena Administration witnesses to defend their actions in hearings before the Committee. With the retirement of Senator Tom Harkin (D-IA), it is unclear who will succeed him as ranking member.

Senator James Inhofe (R-OK), a climate change sceptic, will chair the Environment and Public Works Committee. He is prepared to challenge Environmental Protection Agency rules across the board, especially the greenhouse gas emissions rule.

Senator Orrin Hatch (R-UT) will Chair the Senate Finance Committee. Senator Hatch has served as the top Republican on the Finance Committee since 2011. He has been a staunch opponent of the Affordable Care Act and the individual mandate, in particular, and backs efforts to lower tax rates. One of his top priorities is to repeal the tax on medical devices in the Affordable Care Act. He is expected to begin calling senior members of the Obama administration, such as Health and Human Services Secretary Sylvia Mathews Burwell, to testify before the committee soon upon taking the gavel.

Senator Chuck Grassley (R-IA) will Chair the Senate Judiciary Committee. This committee considers the Attorney General nomination, any potential Supreme Court justice confirmation and Immigration Reform. Senator Grassley is expected to conduct oversight hearings into the Justice Department's role on such controversial subjects as “Fast and Furious” and the IRS targeting of tea party groups. Senator Grassley also is a strong advocate of transparency in the judicial branch. He has authored legislation to extend whistleblower protections to members of the legislative branch and has investigated retaliation against whistleblowers.

Changes in the House Leadership

There will be fewer changes among the Chairs in the House of Representatives, although individual members may decide, based on their seniority, to seek seats on more significant committee assignments. Representative Hal Rogers (R-KY) will continue as Chairman of the Appropriations Committee. House Budget Committee Chairman Paul Ryan (R-WI) will assume the Chairmanship of the House Ways and Means Committee. Representative Tom Price (R-GA) will become Chairman of the Budget Committee. Representative John Kline (R-MN) will remain Chairman of the Committee...
on Education and the Workforce. With George Miller retiring, Bobby Scott (D-VA) probably will become the Ranking Member of the Committee.

Changes within the Administration

It is assumed that most people advising the President in his inner circle at the White House will remain at least for a while. However, one of the President’s closest advisors, Valerie Jarrett, might be pushed aside. Although she cannot be blamed for the Democrats’ poor election showing, many within the White House see her as an obstructor, rather than a facilitator, and responsible for keeping the President in a bubble. Both White House staffers and some Democratic members on the Hill believe that the President will move her into another role.

Shaun Donovan, formerly the Secretary of Housing and Urban Development, was confirmed as the Director of the Office of Management and Budget last July. More recently, the President nominated Loretta Lynch to succeed Eric Holder as Attorney General. It is still to be determined whether Ms. Lynch will be confirmed by the current or the new Congress. A confirmation vote could be used as leverage in other deals the White House and Republican leaders are seeking in the lame duck session.

It is common for senior and junior political appointees to begin seeking positions outside the federal government before the end of the Administration. As these appointees begin to leave their posts, acting executives will substitute for departing officials who were confirmed by the Senate. Then it becomes harder for any administration to implement new policies and legislative initiatives. Attempts at judicial confirmations often diminish at the beginning of the year of the next presidential election.

Possible Legislative Opportunities for Compromise

After an election that turned out more beneficial to Republicans than the most optimistic predictions, much is being written about what happens next for business interests. The analysis seems to be narrowly focused on Obamacare and the President’s predisposition to use his executive authority. Such organizations as the Business Roundtable think that Congress should address tax extenders, Trade Promotion Authority and the federal budget in this year’s lame duck session. There may be interests on both sides of the aisle that want to get things done. Following are brief discussions of possible legislative compromises that might find their way to the President’s desk for signature.

Labor Law. Recently, Garen Dodge, the Government Affairs Practice Group Leader at Jackson Lewis, discussed with Law360 the labor law agenda for the 114th Congress. He said the Republicans likely will try to distance themselves from the President’s pro-labor agenda. Their focus will be on employer-backed legislation, which includes changes in the way the National Labor Relations Board (NLRB) operates. As a result of the President’s interim appointments to fill vacancies on the Board, actions at the agency have become increasingly controversial in the eyes of the business community. One proposal unveiled in September by Senators Mitch McConnell (R-KY) and Lamar Alexander (R-TN) would seek to neutralize the politics of NLRB by increasing the Board’s composition from five to six members, three from each political party.

Dodge suggested that the Republican-controlled Congress will use congressional oversight to investigate the President’s labor and employment law agenda. According to the article, “With control over the Senate Health, Education, Labor and Pensions Committee and the House Education and Workforce Committee, Republican leaders can set the hearing agenda and pick the majority of the witnesses that come to testify. This allows the Republicans to call in administration officials to explain the actions the labor and employment agencies are taking and gives them a measure of control over the messages that come out of those hearings.”
The Republican-controlled Congress also may hold hearings on the actions of the U.S. Equal Employment Opportunity Commission, which is pursuing discrimination cases that some in the employment community believe exceed the agency’s designated authority. Finally, also on the agenda may be oversight of the Administration’s decisions on labor and wages standards that have been imposed on federal contractors by executive orders that raised the minimum wage for contractors to $10.10 per hour and required contractors to disclose labor violations, with the potential loss of contracting opportunities for contractors who, according to the Administration, have been cited for alleged violations.

**Health Care.** In 2015, health care will continue to dominate as the Administration pushes significant rules makings to implement the Affordable Care Act. We think the possibility that Republicans will offer their own version of the health care law is remote. There is too much dissension in the Republican caucuses to come up with a comprehensive alternative to Obamacare. Instead, to satisfy their political base, they likely will pass a bill that repeals the Affordable Care Act in its entirety. Without the 67 votes to override a presidential veto, this will be a symbolic effort. However, once the repeal vote is behind them, the Republicans could introduce and pass reforms that received bipartisan support in the 113th Congress.

Their efforts in the Senate will be tempered by the fact that they still need 60 votes to pass a substantive piece of legislation. Depending on the outcome in Alaska and Louisiana, the Republicans will need the support of seven to nine Democratic Senators, provided the Republican caucus unanimously supports the reforms. Strategically, it makes sense to focus on repealing the medical device tax, revising the definition of a “full-time employee” for purposes of requiring employers to provide health coverage for employees under the ACA employer mandate and promoting the use of flexible spending accounts that will allow Americans to keep their current doctors without a penalty for failing to obtain the requisite level of insurance coverage, among other things.

Administratively, the President delayed implementation of key provisions in the law, including the ACA employer mandate, the large employer reporting requirement and the minimum essential coverage reporting by insurers, until after the elections. In response, some Republicans initiated a lawsuit accusing the President of abusing his executive authority.

The Democrats used the reconciliation process originally to pass Obamacare. The Republicans may use the same process to reform or repeal it. This will depend on their interpretation or revision of Senate rules on how the body processes pending legislation. The Democrats were masterful in blocking legislation the leadership did not want the body to consider. Progress will hinge on whether the Republicans retaliate.

Other health care policy issues also may surface in the next Congress. These include improved payment processing for physicians who accept Medicare patients, improved CMS quality controls for data collected by post-acute care providers, greater oversight over the implementation of the Medicare extenders and implementation of new technological requirements under Obamacare and Medicare that provide for meaningful use of certified health records through the transmission of secure electronic health data to ensure progress on achieving effective interoperability policies that can be implemented as soon as accuracy and privacy issues are resolved.

The ongoing Ebola contagion will keep national policy on national preparedness to treat the virus and contain its spread on the agenda together with proposals to ban visas to people traveling from the infected regions in West Africa.

**Immigration.** There has been no movement on comprehensive immigration reform in Washington in the first 10 months of 2014. According to the Pew Research Center, 71 percent of Americans continue to support a way for unauthorized immigrants to gain legal status and stay in the country – if certain requirements are met. Only one in four respondents said unauthorized immigrants should not be allowed to remain here. The survey was conducted in October 2014, drawing on the responses of a nationwide sampling.
What is holding back comprehensive immigration reform? The bipartisan leaderships in both Houses support the adoption of different strategies for passage of comprehensive immigration reform, as opposed to a piecemeal approach. Looking toward the 2016 presidential election, the Republicans are aware that Governor Mitt Romney received only 27 percent of the Hispanic vote, but the Republican leadership appears unable to hold or discipline the hardline members of their caucus who oppose any path to citizenship for illegal immigrants.

Both the House and Senate have passed immigration reform measures. However the Senate’s bill is comprehensive and provides a fast track to citizenship without much attention to border security. The House has been taking up immigration reform piecemeal and is proceeding at a very deliberative pace.

A bipartisan coalition in the Senate, led by a group of Senators that included Senators Charles Schumer (D-NY) and John McCain (R-AZ), calling themselves the "gang of eight," produced a bill in which they said “…they anticipated the needs of their Republican colleagues, stripping from the bill a diversity visa program that conservatives dislike and ensuring that interests of Southern farmers are accommodated.”

The Senate bill establishes a new "W-visa" program for low-skilled guest workers that recognizes the impact of immigrant flows on the labor supply. These visas are initially capped at 20,000, but they may increase over time. The bill creates an oversight function (the Immigration and Labor Market Research Bureau) to adjust the caps in local labor markets based on worker shortages and surpluses.

The slower approach in the House is intended to educate members from districts with small minority populations who have never handled immigration issues, as well as to fulfill the promises of Republican House leaders that more bills will follow the standard legislative process, allowing more lawmakers to have opportunities to contribute. For House Republicans, the real solution starts with the President cooperating with them on border security and their insistence that illegal immigrants be held accountable for breaking the law. Likewise, they oppose any preferential treatment for illegal immigrants over legal immigrants with respect to the path to citizenship.

The President has been lobbying the House to pass the Senate bill during the lame duck session. He has expressed his intent to unilaterally broaden his controversial 2012 executive action, the Deferred Action for Childhood Arrivals, which allows immigrants who were brought to the U.S. illegally as children to stay in the country and work. We expect him to extend the same provisions of his 2012 order to a larger portion of the undocumented population, perhaps applying to millions of undocumented adults.

This approach may divide Republicans and benefit Democratic candidates leading up to the 2016 election. However, it has limited applicability because it does not enable those who are given amnesty a way to obtain a green card nor does it provide a path to citizenship. It also does not reform existing immigration law, which can be changed only by the Congress. It does not deal with visa issues nor does it address the problem of border security.

In response, Senate Republicans are planning to turn the confirmation process for Attorney General Nominee Loretta Lynch into a larger debate over the President’s use of his executive power to provide amnesty to illegal immigrants. The Republican strategy appears focused on getting her to opine on whether the President has the authority to bypass Congress on immigration — allowing the Republicans to write their own narrative on the nomination.

Senators Ted Cruz and Mike Lee said that immigration will be a large part of their line of questioning of Ms. Lynch when her confirmation process begins, which they said should happen after the new Republican majority is seated in January. Likewise, Senator Orrin Hatch (R-UT) said, “Decisions and actions by President Obama and Attorney General Holder have made the proper bounds of executive power a critically important issue for this confirmation process.”
We expect other contentious issues, such as the Operation Fast and Furious gun-running scandal, the debate over voter ID laws, executive overreach and the IRS scandal, to surface during Ms. Lynch’s confirmation hearings. But the dominant issue likely will be immigration and President Obama’s looming executive action that may halt deportations for millions of immigrants here without legal status.

In his recent press conference, the President promised to keep his pledge to Hispanic and immigration advocates to act on halting deportations by the end of the year. Speaker Boehner respond, “If he acts unilaterally on his own, outside of his authority, he will poison the well and there will be no chance of immigration reform moving in this Congress.”

If this is any indication of how the respective protagonists will behave, the battle lines are drawn. We expect that any possible cooperation will be tested early.

**Mineral and Mining Legislation.** There is a significant opportunity for the mining industry to make progress in the 114th Congress. Republican control gives the U.S. mining industry a welcome respite from Administration policies designed to over-regulate the industry. Many of the members that are returning from western mining states are Republican. Among the members returning to Washington who strongly support the industry are Congressman Mark Amodei (R-NV), Congresswoman Cynthia Lummis (R-WY) and Senator Mike Enzi (R-WY).

Most important is that Senator Lisa Murkowski (R-AK), a strong supporter of mining and permitting reform legislation, will be the new Chairperson of the Senate Energy and Natural Resources Committee. In her efforts to expand domestic mining, Senator Murkowski introduced critical minerals legislation in 2011 and in 2013 and has spoken out against current domestic policies on U.S. mining production. Murkowski has said, “Our mineral-related policies remain outdated. Our dependence on foreign minerals is reportedly deepening. Our agencies are not as coordinated and focused on this issue as they need to be. And when it comes to permitting delays for mines, our nation is tied for last – meaning worst – in the world.”

We believe her Committee may offer one the best opportunities for bipartisan cooperation. If Senator Landrieu (D-LA) wins her runoff election in December, she will become the Ranking Member; otherwise, it will be the more liberal Senator Cantwell (D-WA). Regardless, Senator Murkowski likely will reintroduce and push for passage of the Critical Minerals Policy Act (S. 1600), which she introduced with Senator Ron Wyden (D-OR) and 18 cosponsors, including 10 Democrats and eight Republicans.

The Critical Minerals Policy Act is designed to revitalize the U.S.’s critical minerals supply and help reduce the country’s reliance on foreign suppliers. It directs the Secretary of the Interior to establish a list of minerals critical to the American economy and provides a comprehensive set of policies to address issues related to their discovery, production use and re-use. Passage of the bill has been a high priority of the mining industry and Senator Murkowski is expected to press for pro-industry energy initiatives.

**Coal Ash.** The House Energy and Commerce Committee in 2013 renewed its efforts to define the proper state and federal roles in regulating coal ash, more than four years after the disastrous December 2008 spill of the substance at a Tennessee Valley Authority plant near Harriman. Robert J. Martineau Jr., commissioner of the Tennessee Department of Environment and Conservation, testified before the Committee that states continue to support regulating coal ash management and disposal themselves -- but under federal standards established by Congress.

Coal ash is the byproduct of coal-fired electricity plants, used in the production of concrete and is prevalent in the Southeast. It contains such elements as arsenic, cadmium and mercury that can pose health threats if not properly managed. The TVA incident resulted in more than 1 billion gallons of coal-ash slurry being dumped into the Emory and Clinch rivers, a cleanup cost of more than $1.2 billion and an EPA initiative to regulate coal ash more strictly.
The EPA is under court order to issue final rule by December 19, 2014 and the proposed rules are being reviewed at OMB. If the Administration decides to issue more stringent regulations, they would make coal an even less attractive fuel for the electric industry and likewise reduce the amount of ash for re-use.

Therefore, we think it likely that the coal industry will push for congressional oversight of the rule and a legislative effort by the utility and coal industries to reduce the stringency of any rule that EPA promulgates.

For further information about this article, please contact Garen E. Dodge, Robert J. Horn, or the Jackson Lewis attorney with whom you normally work.