

PATTON BOGGS LLP
www.pattonboggs.com

Beyond President Obama's Busy First 100 Days



PATTON BOGGS LLP
April 29, 2009

April 29, 2009

Beyond President Obama's Busy First 100 Days

Upon his return from France in 1787, Thomas Jefferson paid a visit to George Washington. During a conversation about why the Founding Fathers had created the Senate to be so different from the House of Representatives, Jefferson poured some coffee into his saucer. "Why did you do that?" asked Washington. "To cool it," said Jefferson. "Even so," responded Washington, "we pour legislation into the senatorial saucer to cool it."

Today, President Barack Obama will have been in office 100 days. Throughout this period, he has been constantly reminded about the central role of the Senate in shaping legislation into a form in which it will be enacted into law, or not. As the first sitting Senator elected to the White House since 1960, the President has a keener sense than many of his predecessors about the power of one Senator to block legislative action on important bills. He understood, for example, that enacting his \$787 billion stimulus bill depended ultimately not on the position of 257 House Democrats, but on the views of three moderate Republican Senators. The President also knew he could discourage the Senate from taking quick action when the market reacted to the confiscatory tax legislation adopted by the House in response to news reports about the \$165 million in bonuses paid to AIG employees. For the remainder of his presidency, the Senate will largely be the body in which his goals are achieved or his hopes are dashed, and where the heat generated in the House will have time to dissipate.

With the help of senior, very experienced Hill and former top Clinton Administration staffers, the President and his transition team had a fully formed legislative agenda with a strong team in place, which enabled him to move quickly on his 100-day agenda. How have they done? In short, the President and his team have already accomplished much.

Notwithstanding the challenges he has faced as the economy has worsened and foreign crises have occurred, President Obama has made substantial progress in keeping attention focused on his three principal legislative priorities: health care reform, comprehensive energy and climate change legislation, and education reform. In addition, he got agreement on a \$787 billion bill to stimulate the economy, a \$410 billion bill to fund non-defense portions of the government in FY 2009, and a bill making available the second tranche of the \$350 billion authorized by the 110th Congress to fund the Troubled Asset Relief Program.

The President also has delivered on many of his campaign promises. On Monday, House and Senate conferees agreed on a budget resolution that would maintain the President's budget priorities for the next five years and would advance his health care, green energy, and education initiatives, clearing the way for final passage of a budget resolution this week. Congress already has passed and the President has signed into law legislation reversing a Supreme Court decision so as to enable women to pursue pay discrimination lawsuits, expanding a loan program for small businesses, extending the Alternative Minimum Tax "patch" for middle-class taxpayers, expanding the

availability of health care for families through the State Children's Health Insurance Fund, spending \$5 billion weatherizing one million homes and investing another \$55 billion in renewable energy, expanding access to broadband technology, supporting the construction of high-speed rail, extending unemployment insurance benefits to millions of Americans, and temporarily suspending taxes on these benefits.

Administratively, the President also has continued to implement promises he made during the campaign. For example, he has appointed Republicans to his Cabinet, begun the process of closing down the detention facilities at Guantanamo Bay, lifted long-standing restrictions on travel to Cuba so that Cuban-American families can visit relatives more often and can send them more money, banned lobbyist gifts to executive branch employees, carried through on his promise to make government more open and transparent, created a White House Office on Urban Affairs and a White House Office of Health Care Reform, agreed to provide additional financial assistance to domestic automobile manufacturers and parts suppliers, adopted a series of initiatives to address the financial crisis confronting the economy, reversed the Bush Administration's restrictions on stem-cell research, rolled back a Bush Administration policy on releasing Presidential records to the public, repealed a Bush Administration Executive Order governing labor contracts for federal construction projects, sent two additional brigades to Afghanistan, opened the door to direct negotiations with the leadership of Iran, begun to mend relations with Russia, and committed to a timetable for removing combat troops from Iraq.

All this and more in 100 days.

Now that the relatively easy work is behind him, what lies ahead? Unlike prior presidents, who devoted the bulk of their efforts to pursuing one major initiative at a time, President Obama will press forward on all of his main policy objectives, and more. Real challenges lie ahead. All things considered, moving the \$787 billion stimulus bill was easy compared to addressing the fundamental challenges still facing the economy and the financial system, or persuading Congress to adopt health care reform or climate change legislation. He will now face fierce opposition, coming from many directions, as Congress splinters on both ideological and geographic lines. In fact, he is going to need the help of many House Democrats just to get the hot stuff into the cup, let alone cooling some of it in the saucer of the Senate.

As he did during the campaign and his trip to Europe, the President will continue to appeal directly to the public for support. He has done a masterful job of using public events, vilifying lobbyists, and reaching out to Congress to build public support for his initiatives and to generate the political capital he will need to win major fights ahead. To advance his agenda, the White House will continue to use deadlines and broad themes (*e.g.*, stimulus legislation by President's Day, budget resolutions by Easter) to drive action. Embracing a 100-Day Agenda was important not only as a deadline and to establish priorities, but as a way to invoke memories of President Franklin D. Roosevelt's success in using the powers of the federal government to help people recover from the Great Depression. Finally, the public enthusiasm the First Lady has generated will continue to help build support for his efforts.

Like others of his generation, the President understands the power of new technology, in particular new media and social media tools. He will use them to expand his base of support to

advance his multi-faceted agenda. Having recognized the power of YouTube during the campaign, for example, the Administration now maintains a dedicated staff devoted to new media. The staff regularly upload movie-quality videos to YouTube, through which it has built a significant following with one of the most viewed and subscribed to channels. As part of this new media effort, the President will continue to invite the public to participate directly in governing, as he has done by using a dedicated website for the public to provide suggestions for spending stimulus funds and to track how they are ultimately spent.

So, notwithstanding the odds being stacked against him, the President will continue to press ahead with health care reform, a comprehensive energy/climate change bill, and legislation to reauthorize the No Child Left Behind education bill and to eliminate the private lending program for higher education by making the federal government the sole source of government-funded lending. In addition, the Administration is working with Congress to enact legislation that will create a “systemic risk” regulator and to reform the entire financial system. At the same time, the Justice Department and the Securities and Exchange Commission will continue to pursue a vigorous enforcement agenda, both at home and abroad. Moreover, the President will soon push Congress for an additional \$75.5 billion to fund the war effort in Iraq and Afghanistan (plus \$7.1 billion more in foreign aid), potentially triggering a fight with liberal Democrats who are opposed to the war in Iraq and with conservative Democrats who want to spend additional money on military hardware to support the troops. If that were not an ambitious enough agenda, the President has signaled a desire to also address immigration reform during the 111th Congress.

To be successful and to lay the groundwork to consolidate power going into the 2010 mid-term elections, the President and the Democratic Congress need to govern from the center of the country, not from the center of the Democratic Party. Notwithstanding the commanding majority Democrats enjoy in the House and the Senate, the advancement of a broad liberal agenda on the war or any other issue seems remote. In our view, moderate Democratic and Republican Senators will be the ones setting the agenda, as they seek to establish consensus that eluded the closely divided (51-49) Senate for the past two years. With Senator Arlen Specter (R-PA) having announced that he is switching to the Democratic Party to run for re-election, the Democrats will be one vote closer to having 60 votes in the Senate. On a few issues this may make a difference. But since most issues are not decided on a party-line basis, we do not believe this fundamentally alters the equation. Coalitions will continue to emerge in the Senate as a means of achieving 60 votes to advance priorities for the benefit of the middle of the country. Moderate coalitions offer the real prospect of legislating from the center, blocking bills written in haste in the House.

As we look ahead, the country continues to face the most threatening economic environment since the Great Depression. In addition to inheriting a global economic crisis of historic proportions, a domestic fiscal system under tremendous strain, and a looming health care and fiscal crisis as Baby Boomers begin retiring, President Obama will continue to be confronted by two wars, an overstretched military, and the threat of a nuclear Iran and a nuclear North Korea. Deeply fundamental challenges will continue to confront the new president and the new Congress.

Based on the President’s first 100 days, we offer below our thoughts on likely significant developments in three areas that will continue to dominate the agenda in Washington: financial services regulation, health care reform, and energy and climate change legislation.

Financial Services Reform. With the center of financial decision-making having moved from New York City to Washington, DC, American politics is returning to an every-day focus on banking. Over the past two decades, as Congress deregulated the financial system, average voters paid little heed to the legislation enacted in Washington or the esoteric financial products dreamt up in New York. But they are paying attention now. As a result, the politics of the day revolve in great measure around banking, just as they did at the beginning of the nineteenth century during the debate over the formation of the Bank of the United States, at the end of that century when adoption of a gold standard preoccupied the nation, over bank and stock market regulation following the collapse of the stock market in 1929, and during the aftermath of the Savings and Loan crisis of the 1980s.

Throughout his first 100 days, President Obama has tried to guide the country through the crisis, focusing in the first instance on providing additional financial assistance under the Emergency Economic Stabilization Act of 2008 to banks, automotive manufacturers, insurance companies, and others. Most recently, the Treasury Department has announced plans for public-private investment partnerships to provide further relief through purchases of so-called “toxic” assets from banks and other financial institutions. The recent furor over executive bonuses paid by AIG and other financial institutions and the continued slowness of assisted institutions in providing credit to businesses and consumers has created a substantial backlash in Congress, which can be expected to lead to the passage of new legislation applicable to those entities that receive federal assistance and to make the Obama Administration cautious in seeking additional funds for rescue operations.

The G-20 Summit in London served as a catalyst to force both the Obama Administration and the Congress to focus not only on rescue and recovery initiatives, but also on longer term “regulatory reform” initiatives designed to address the perceived causes of the current crisis and to prevent future reoccurrences. In late March, the Department of the Treasury outlined a series of proposed regulatory reforms intended to address systemic risk, protect customers and consumers, eliminate gaps in the U.S. regulatory structure, and foster international cooperation. These objectives would be achieved through a broad range of initiatives such as the following: creation of a single regulator with powers to monitor and address systemic risks, including those presented by large firms that are not now subject to federal regulation; higher capital and risk management standards for systemically important institutions; requiring most managers of hedge funds and other private pools of capital to register with federal securities authorities and provide a broad range of information to regulators, investors, and counterparties; comprehensive regulation and supervision of the over-the-counter markets in derivatives, including credit default swaps; and a new “resolution authority” to protect against the failure of large and complex institutions.

Taken together, the rescue and recovery operations now underway and the regulatory reforms that are just over the horizon mean that, as the recent experiences of General Motors, Chrysler, AIG, and others confirm, Washington will for the foreseeable future play an active role in many sectors of the economy, ranging from financial services and investment to basic manufacturing. The level of governmental involvement will be unprecedented in the post-World War II era and will be accompanied by increased tax scrutiny of businesses doing business in and from the United States. And the financial services and products sector of the economy will be a focal point of this new level of regulation and scrutiny.

Health Care Reform. While Congress and the White House are making efforts to gather public input through hearings, meetings, and stakeholder forums, the real action lies with key Committee Members and staff, who are assembling what may be fairly divergent bills in the House and the Senate. Congress is only now beginning to come to grips with the high level of subsidy required to make any health system work, be it through individual mandate, employer mandate, Medicare buy-in, or subsidized federal plan options. This will put all the more pressure on Congress to extract savings out of current Medicare providers and even from beneficiaries. During the month of May, we will begin to see portions of the major reform proposals come out of key Committees.

As noted above, much has already been done in the first 100 days. Congress has expanded health care coverage for low-income children with the SCHIP Reauthorization Act, actively held numerous Committee hearings to discuss health care reform options, passed Budget Resolutions containing the President's health care priorities, and set an aggressive agenda for accomplishing health care reform this year. President Obama held a White House Health Summit, which called for health reform by the end of 2009. In addition, the stimulus legislation signed into law by the President in February included:

- \$2.5 billion for community health centers;
- \$10 billion in NIH funding, which includes biomedical research;
- \$1.1 billion for comparative effectiveness research;
- \$1 billion for the Prevention and Wellness Fund;
- \$19 billion for grants for health information technology (HIT) a variety of health care providers, including physicians and hospitals; and
- \$500 million for health care workforce training.

The pace of health care reform is now picking up quickly. Senate Finance Chairman Baucus has laid out a three-part plan: Delivery System Reform, Coverage and Coverage Expansion, and Cost Containment. The Senate Finance Committee proposes that the comprehensive health care bill be ready for mark-up by June and on the Senate floor by July; the HELP Committee is looking to release a bill on May 22 and hold a markup on June 1. In the House, Committee Chairmen have pledged to bring health care reform to the House floor before the August recess.

President Obama's FY 2010 Budget aggressively promoted health care. It contains a Health Care Reserve Fund of more than \$630 billion and proposes Health Care Savings in the following areas:

- competitive bidding in the Medicare Advantage program (\$176 billion);
- payment rate reductions for home health services in Medicare (\$51 billion);
- elimination of the Medicare and Medicaid Improvement Funds (\$23 billion);
- establishment of a bundled payment system for hospital inpatient care and post-acute care (\$18 billion);
- increased rebates paid by pharmaceutical manufacturers to Medicaid (\$16 billion); and
- creation of a regulatory pathway for biologics (\$13 billion).

In addition, the President has proposed creating a new public health plan with guaranteed eligibility, similar in design to FEHBP; and requires employers to offer employee health benefits or contribute to the cost of the new public program. His plan also would create the National Health Insurance Exchange through which small businesses and individuals without access to other public programs or employer-based coverage could enroll in the new public plan or in approved private plans and expands Medicaid and SCHIP and require all children to have health insurance. It would focus on preventing chronic illness by promoting disease management, providing better care coordination, as well as quality and patient safety.

Health care reform remains the highest domestic priority issue of the Administration after economic recovery. The Obama Administration, having learned the lesson of the failed Clinton effort, is allowing each House of Congress to proceed largely on its own to develop a health care reform agenda. The Administration has been providing technical support, advice, and building political support for health care reform. We believe the Administration will enter a much more active phase as Congress begins the process of actually marking up and reconciling legislation. In addition, the Administration will play an essential role in the crucial internal debate over what “pay fors” are politically viable to fund health care reform.

Energy and Climate Change Legislation. During the campaign, President Obama emphasized that enacting a new energy policy would be one of his highest priorities. Advancing this goal has been a central element of his 100-day agenda. The stimulus bill, for example, included approximately \$60 billion in spending and tax breaks to encourage greater use of renewable energy and to save energy, such as through a \$5 billion program to help homeowners weatherize their homes. Having gotten the easy part done, the Administration now faces more daunting odds in moving forward to enact the rest of the President’s green energy agenda.

Although President Obama and his advisors have spoken often of their desire to move a comprehensive energy bill and to enact a cap-and-trade bill to address climate change, the challenges of moving a cap-and-trade bill are now becoming increasingly evident. We believe the President can persuade the 111th Congress to agree to a comprehensive energy bill, but we do not believe Congress will take final action on climate change legislation until 2011 or 2012.

In his first budget submission, the President called on Congress to enact “an economy-wide emissions reduction program to reduce greenhouse gas emissions approximately 14 percent below 2005 levels by 2020, and approximately 83 percent below 2005 levels by 2050.” Returning to a theme from the campaign, he proposed to auction all allowances from day one “to ensure that the biggest polluters do not enjoy windfall profits” With the auction revenues, he wants to invest \$150 billion over ten years on clean energy technologies, with the balance to be “returned to the people.” In addition, to further his vision of a greener economy, the President’s budget proposal would eliminate most of the provisions in the tax code written over the years to encourage domestic oil and gas production. But the realities of legislating, especially in an economic downturn, are becoming increasingly evident.

As the House moves forward on a comprehensive energy and climate change bill, the Senate is already expressing caution. In a span of only a few days, on one side of the Capitol Chairmen Henry Waxman (D-CA) and Ed Markey (D-MA) put forward a comprehensive, 648-page

“discussion draft” of a combined climate change and energy bill, while on the other side of the Capitol the Senate went on record by a 2-1 margin against using special budget procedures to consider a cap-and-trade climate change bill. Democratic Senators from coal and automobile manufacturing States joined all Republican Senators in adopting the amendment, as well as an amendment that would establish a point of order against climate change legislation that would cause significant job losses in manufacturing and coal-dependent regions of the country. In addition, the Senate adopted by a vote of 89-8 an amendment that provides that any climate change legislation must not increase electricity or gasoline prices—precisely what the legislation must do in order to discourage consumption of carbon-rich fuels.

The Waxman-Markey discussion draft is an ambitious effort to implement major elements of the President’s proposed climate change and green energy proposals. Like the President’s proposal, the discussion draft would cut GHG emissions by 83 percent below 2005 levels by 2050, with an even more aggressive 20 percent reduction by 2020. In addition, the discussion draft would provide the President with the authority to impose “border adjustments” on imports of manufactured goods to “cover” the carbon contained in them. For now, the discussion draft leaves open the question of whether 100 percent of allowances would be auctioned, as proposed by the President. To implement other aspects of the President’s proposed energy proposals, the discussion draft would require electric utilities to produce 25 percent of their electricity from renewable energy sources by 2025, requiring a percentage increase well beyond what many utilities can achieve in some parts of the country that lack access to hydroelectric or wind power in particular. The discussion draft also would establish a low-carbon fuel standard to encourage greater production and use of renewable energy in cars and trucks. In addition, it would promote development of a smart electricity grid, would encourage development of carbon capture and storage technologies, and would further expand energy-efficiency programs across all sectors of the economy, including buildings, appliances, transportation, and industry. The discussion draft, however, would do nothing to encourage domestic oil and gas production.

Chairmen Waxman and Markey hope to have a bill approved by the Energy and Commerce Committee by the end of May. Other committees, such as the Ways and Means Committee, the Agriculture Committee, and the Science and Technology Committee, may well produce their own climate change bills or propose changes to the version produced by the Energy and Commerce Committee. The Speaker will be pressing for the House to complete action on a comprehensive bill by the August recess. But we see no prospect of the Senate doing anything comparable.

While the Senate will move more cautiously on climate change legislation, prospects remain good to implement other aspects of the President’s energy agenda. As it becomes more evident that climate change legislation is not in the cards this year, we expect the focus in the Senate (and ultimately in the House) to shift to health care reform and education policy, the other two of the President’s principal priorities.

Conclusion. We look forward to the challenges ahead. As a firm with deep public policy roots, we are proud of our ability to help clients exercise a right enshrined in the U.S. Constitution by petitioning their government. We have been at it since 1965, when Jim Patton encouraged a young White House aide named Tom Boggs to help him build a different kind of law firm, one that understood that all three branches of government could provide solutions to challenging problems.

By combining political know-how, legislative experience, and substantive knowledge of the law, they had a vision for helping clients achieve success.

Since that time, we have grown into an international law firm of nearly 600 hundred lawyers who specialize in all phases of business law, litigation and dispute resolution, intellectual property, and public policy. Despite this growth and diversification of the practice, we have not lost sight of the original vision of helping clients achieve success by combining political know-how, legislative experience, and substantive knowledge of the law. We have and will continue to build on that vision. For our business and pro bono clients alike, we look forward to helping them achieve their legislative and regulatory objectives as President Obama moves beyond his 100-day agenda, the House moves forward on his remaining legislative priorities, and the Senate acts as the saucer into which hot liquid is poured to cool.

To learn more about Patton Boggs LLP, please visit our website at www.PattonBoggs.com.