SSDA SERVICE STATION DEALERS OF AMERICA AND ALLIED TRADES

SSDA News

Service Station Dealers of America and Allied Trades

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LEGISLATIVE UPDATE

By Roy Littlefield

ABOLISH THE GAS TAX

As Congress considers options (including a substantial increase in the motor fuel tax) to fund a long-term transportation bill, a recent Wall Street Journal editorial urged Republicans in Congress to eliminate completely the gas tax.

The gas tax is a regressive tax that hits hardest on low income families, who drive older cars with lower miles per gallon.

Agreeing with SSDA-AT testimony, position papers, and lobbying, the Wall Street Journal noted that since the 1990s we have seen more and more diversion of highway funds for programs such as street cars, ferries, sidewalks, bike lanes, hiking trails, mass transit, airports, and ports.

Diversion has increased by 38% since 2008. In his transportation proposal, President Obama would like to triple the budget for mass transit.

While the gas tax is regressive on lower income Americans, non-highway projects being funded tend to be used by upper class citizens who are not paying for the projects. Trolley riders, for example, contribute nothing to the Highway Trust Fund.

Spending money on highways which were collected for highway use, would make the Highway Trust Fund 98% solvent for the next 10 years, with no tax increase.

PRESIDENT TO PUSH DOMESTIC PLAN

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BEST OF

GENERAL COUNSEL CORNER

Getting Hosed at the Pump: the PMPA Defense

(February, 2013)

By Peter H. Gunst , Esquire
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(***We will re-run some of Peter's articles and update with new ones when available - fortunately there have been no big cases lately for Peter to report on. When something comes up, we will let you know that it is new. Thank you - Ed.)***

Usually this column focuses upon Part I of the Petroleum Marketing Practices Act ("PMPA"), which governs termination or nonrenewal of the franchise relationship between supplier and dealer. There exists, however, another portion of the PMPA – Part II – which governs the posting of octane ratings at the pump. Recently, that relatively obscure portion of the PMPA has come to the fore in the defense of consumer fraud litigation.

Class action attorneys have brought suits on behalf of consumers of premium gasoline, contending that they have been cheated because they are charged the premium price for the fraction of a gallon of regular gasoline that remains in the dispenser hose, when a previous customer has purchased regular product.

Although the price differential involved is trivial, these claims are significant because they seek damages for an entire consumer class, and because they request significant and expensive injunctive relief by demanding fundamental changes to the pump dispensation system.

One such action was *Alvarez v. Chevron Corp.,* 656 F.3d 925 (9th Cir. 2011), where six California consumers brought a diversity of citizenship claim in federal court against the major refiners, charging them with breach of contract and violation of California statutes dealing with unfair competition, consumer fraud and false advertising.

After the district court dismissed the consumers' complaint for failure to state a viable cause of action, the would- be class action claimants appealed to the United States Court of Appeals for the Ninth Circuit.

In a unanimous three judge opinion, the appeals court agreed with the district court that the consumers' breach of contract claim was barred by their failure, required under California law, to provide the refiners with notice of their claim before filing suit. Despite the fact that a prefiling notice would almost certainly have been an exercise in futility, the appeals court held that it was expressly mandated by California state law.

The appeals court also agreed with the district court's determination that the refiners were entitled to a "safe harbor" from liability under California's unfair competition and consumer protected statutes because they had complied with the dispenser design requirements established by California statute. In so holding, the appeals court relied upon a California state court determination that, where the legislature "has *permitted* certain conduct, ... courts may not override that determination."

Part II of the PMPA became important when the appeals court considered the consumers' final claim, that the refiners had violated California's False Advertising Law by "advertis[ing] motor fuel for sale as having a minimum octane rating when, in reality, the initial 0.2-0.3 gallons of such motor fuel sold had a lower octane rating due to the residual fuel [situation]."
Once again agreeing with the district court's conclusion, the appeals court emphasized the express re-

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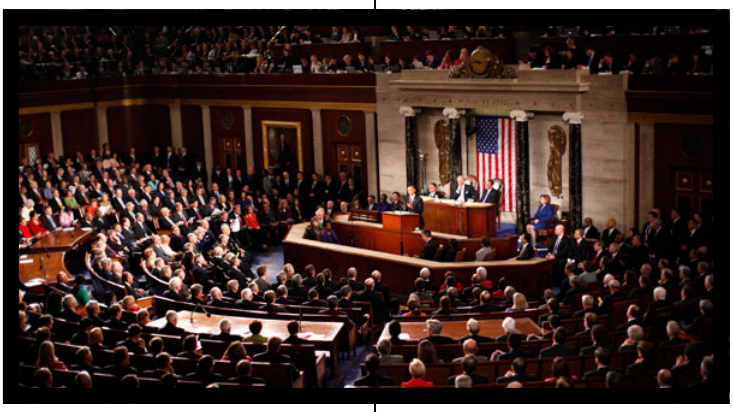
2015 Congressional Outlook

The 114th Congress has been sworn in and is off to a quick and exciting start. With ambitious agendas being rolled out on both sides of the Hill, it is clear that the Republicans intend to waste no time in utilizing their majorities in each chamber to act on a number of high profile issues.



While the Republicans control both the House and Senate, they do not have enough votes in either chamber to break a presidential veto without bipartisan support. In the House, the Republicans would need the support of all of their members plus forty-eight Democratic members to reach the veto breaking supermajority, while in the Senate the Republicans would need all their members plus thirteen additional votes from either Democratic or Independent members (both Independent Senators currently caucus with the Democrats). While there are sure to be times when certain Democratic members vote against the President, the occasions on which Republicans, particularly in the Senate, will be able to rally enough Democratic votes to override a Presidential veto are likely to be very rare indeed, if any. Of the forty-four Senate Democrats, only a handful of them are considered to be true moderates who may be more inclined than their more liberal colleagues to cross the aisle and vote against the President. Additionally, there are only ten Senate Democrats who will be up for reelection in 2016, every one of them in states that President Obama won in 2012, thus significantly minimizing pending electoral pressures as impetus for crossing party lines.

With the White House already threatening vetoes of a number of bills currently in the Congressional pipelines, it remains to be seen whether 2015 will be another year of gridlock or whether the leadership on both sides of the aisle, as well as on both ends of Pennsylvania Avenue, will be able to find some areas of consensus to move forward on.

With a number of essential items that must be addressed in some form this year – including, funding for the Department of Homeland Security, the debt limit, and the Highway Trust Fund - we expect to see things fall somewhere in the middle.

Changing the Rules

The Republican leadership in the House kicked off the first day of the legislative session by adopting, by resolution (H. Res. 5), a rule change which could have important implications for the tax reform debate that sits clearly on the horizon. The resolution directs the non-partisan Joint Committee on Taxation (JCT) and Congressional Budget Office (CBO), which are responsible for performing legislative analyses, to begin to use what is known as "dynamic scoring."

Traditionally, the JCT and CBO have used what is known as "static scoring," a method which calculates the fiscal impact of a piece of legislation, for example a change to the tax code, by looking only at its direct and known impact. In other words, static scoring generally does not attempt to predict, and makes limited assumptions about, whether a piece of legislation will have any secondary impact on economic behavior. Dynamic scoring, on the other hand, includes in its calculations likely changes that the legislation will have on economic behavior. Suppose, for example, that the government taxes all widget sales at 10% and in doing so raises $20 million in revenue. Congressman X in-

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Abolish the Gas Tax

A better way to fund roads and bridges than more pain at the pump.

Tumbling energy prices are the first lucky break for U.S. consumers in years, but Washington is feeling left out. So the gougers of both parties are joining to steal some of the proceeds with the first gasoline tax hike in more than two decades.

The federal gas tax is now 18.4 cents a gallon and the logic seems to be that motorists won't notice an extra dime or more since gas prices are down 40% on average from the 2014 peak. Congress can then "invest" the windfall in roads, bridges and other projects. A convenient pretext for a tax increase arrives in May with the expiration of a temporary highway funding bill, and many otherwise intelligent Republicans are open to the idea, perhaps as a tax swap.

Now here is a formula for popularity that only a lobbyist or liberal could love: As one of its first major acts, the new GOP majority would make the commodity that most Americans must buy every week more expensive, offsetting the discretionary-income gains from cheaper gas. Republicans should be talking about downsizing the federal gas tax instead, with a target of zero.

The gas tax—plus a 24.4 cent tax on diesel and other excises—finances something called the Highway Trust Fund, or HTF. The proceeds from the original 1956 three-cent tax built the interstate highway system and its expansion and upgrades over the decades. The tax was increased in 1982, 1990 and 1993.

The problem is that since 2008 federal HTF spending has far outpaced dedicated gas-tax revenues, and Congress has made up the difference with $54 billion in cash transfers from general revenues. To cover future HTF obligations and close the deficits, fuel taxes need to rise by 10 to 15 cents a gallon, according to the Congressional Budget Office.

The solons now claim the arc of history bends toward precisely that. The real purchasing power of 18.4 cents has slipped amid inflation and the rising cost of labor and materials. Vehicle miles travelled are plateauing and cars are more efficient, eroding the projected growth of the tax base.

But since the 1990s, the Highway Trust Fund has come to fund much more than new roads and bridges and highway maintenance, abandoning the original "user pays" principle behind a gas tax. Drivers now see about a quarter of their gas taxes diverted to subsidize mass transit in merely six metro areas and sundry other programs for street cars, ferries, sidewalks, bike lanes, hiking trails, urban planning and even landscaping nationwide. Trolley riders, et al., contribute nothing to the HTF.

Federal spending on such side projects has increased 38% since 2008, while highway spending is flat. Here's what the politicians won't say: Simply using the taxes that are supposed to pay for highways to, well, pay for highways makes the HTF 98% solvent for the next decade, no tax increase necessary.

Your local interstate will not close if HTF "goes broke." The feds will continue to spend all the money that the gas tax will continue to throw off. Some projects would merely be delayed, or states and cities would fill the gaps.

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Abolish the Gas Tax

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Another myth is that U.S. roads and bridges are "crumbling," to use the invariable media description. Federal Highway Administration data show that the condition, quality and safety of U.S. surface transportation are steadily improving. The Chicago Federal Reserve Bank noted in a 2009 paper that roads have "indisputably" improved over the last two decades and that "the surface of the median interstate highway mile is suitable for superhighway speeds not typically permitted in the United States."

Some highways do need repair and modernization, and the U.S. does need more roads to relieve congestion and encourage trade and economic activity. The real crisis isn't the amount of money but how it is spent.

The 47,714 miles of the interstate highway network would likely be less complete absent federal support, but the system was officially finished in 1992. It is less rational for drivers nationwide to send so many dollars to Washington for Congress to apportion among winners and losers as they did under Eisenhower. Today, the costs of transportation can be reasonably borne by the people who enjoy the benefits, which will generate more accountability and fewer political boondoggles.

In an ingenious 2013 paper, Pengyu Zhu of Boise State University and Jeffrey Brown of Florida State studied federal highway spending between 1974 and 2008. They found that the gas tax tended to redistribute money from poorer to wealthier states and to regions with lower transportation needs than other parts of the country.

Texas recovered only 88 cents of every dollar residents paid in taxes, while seven states and Washington, D.C. (no surprise) received more than twice as much. Such misallocated resources are the inevitable result of the political mediation of the HTF.

Almost three-quarters of highway spending is already supplied by state and local governments, and if the federal role is reduced, they can decide either to increase their own gas taxes; fund roads some other way, such as tolls or public-private partnerships; or use tax dollars for other priorities like schools. States can build cheaper in any case, since the Davis-Bacon prevailing wage rules and Buy America procurement provisions that accompany federal funding don't apply.

Democrats always want to raise the gas tax. When prices are high, that's the best time to encourage drivers to buy an electric car or take the bus. When prices are low, they can skim some of the proceeds for other spending. The mystery is why Republicans would go along.

An Opportunity for Energy Leadership

Jobs and the economy are still voters' top priorities by far. So it's no wonder congressional candidates spent so much time on the campaign trail positioning themselves as champions of the American energy resurgence. The oil and natural gas industry supports 9.8 million American jobs, contributes $1.2 trillion to the U.S. gross domestic product and has spurred a manufacturing renaissance.

President Barack Obama has also joined the chorus, claiming in a recent speech at Northwestern University that America is a world energy leader because "right off the bat" his administration "upped our investments in American energy."

In reality, we've become the world's leading natural gas producer and soon-to-be leading oil producer despite, not because of, White House policies.

If President Obama has a signature energy policy, it is delaying the Keystone XL pipeline for six years. And the squandered energy opportunities don't stop there. Eighty-seven percent of federal offshore acreage is off limits to energy development after the president reinstated a drilling ban that had been lifted in 2008, and production is down on federally controlled lands — 6 percent for crude oil and 28 percent for natural gas. The outdated crude export ban remains intact, and we run the risk of losing our competitive advantage as the world's leading natural gas producer due to the administration's slow pace in approving natural gas export applications.

With the election behind us, Congress has a mandate to step into the energy leadership vacuum and move forward with pro-energy policies that will create jobs and grow the economy. Congress can take the first steps before year's end by sending several bills with strong, bipartisan support to the White House. These include a Senate-approved measure to help Bureau of Land Management field offices process drilling permits, a House-passed measure accelerating liquefied natural gas exports, and long-delayed legislation to get construction started on the Keystone XL pipeline.

Polls show 77 percent of American voters support increased production of America's oil and natural gas resources, and increasing access to onshore and offshore resources is an economic winner. Removing obstacles to energy development could create 1 million American jobs, generate $127 billion in government revenue and increase oil and natural gas production as much as 4 million barrels per day over the coming decade.

Voters also overwhelmingly support moving forward with the exhaustively studied Keystone XL pipeline. After five positive environmental assessments from the State Department, President Obama's failure to grant approval is the only barrier to building the pipeline, which would create 42,000 jobs right away during the construction phase, plus deliver 830,000 barrels of oil per day from Canada and the U.S. Bakken region to U.S. refineries — moving us closer to true energy security in North America — as impossible as it may seem to Americans who lived through the '70s oil embargo.

Anti-Dumping Tariffs Have Been Assigned!

The U.S. Department of Commerce announced its affirmative preliminary determination in the anti-dumping investigation of imports of certain passenger vehicle and light truck tires from China on Jan. 21, 2015.

The investigation "covers certain passenger vehicle and light truck tires, which are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation," according to the DOC. "Such tires are suitable for use on motor cars and on-the-highway light trucks." (ST tires are exempt.)

A long list of companies has been assigned a separate rate of 27.72%. They include Cooper Tire & Rubber Co., Goodyear Dalian Tire Co. Ltd., Bridgestone (Wuxi) Tire Co. Ltd., Cheng Shin Tire & Rubber (China) Co. Ltd., Hankook Tire China Co. Ltd., Kenda Rubber (China) Co. Ltd., Kumho Tire Co. Inc., Pirelli Tyre Co. Ltd., Shandong Linglong Tyre Co. Ltd., Qingdao Nexen Tire Corp. and Toyo Tire (Zhangjiagang) Co. Ltd.

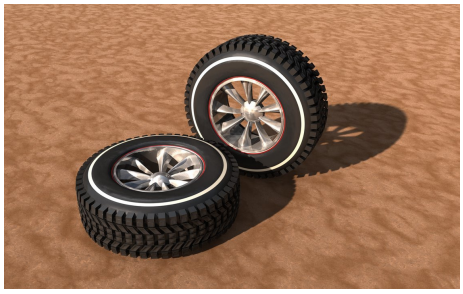
The following companies have been assigned the following tariffs:

- Giti Tire Global Trading Pte. Ltd., Giti Tire (USA) Ltd., Giti Tire (Anhui) Company Ltd., Giti Tire (Fujian) Co. Ltd., and Giti Tire (Hualin) Company Ltd./Giti Tire (Anhui) Company Ltd., Giti Tire (Fujian) Co. Ltd., and Giti Tire (Hualin) Co. Ltd.: 19.17%.
- Sailun Group Co., Ltd., Sailun Tire International Corp., Shandong Jinyu Industrial Co., Ltd., Jinyu International Holding Co., Limited, Seatex International Inc., Dynamic Tire Corp., Husky Tire Corp., and Seatex PTE. Ltd./Sailun Group Co., Ltd., and Shandong Jinyu Industrial Co. Ltd.: 36.26%.

The China-wide rate for anyone not on the list or previously listed is 87.99%.

The DOC preliminarily determined that the imports being investigated "have been sold in the United States at dumping margins ranging from 19.17% to 87.99%."

The anti-dumping (AD) duties are in addition to the countervailing (CV) duties assigned last year -- and to the 4% tariff placed on all consumer tires imported from China. For example, the tariffs on passenger and light truck tire imports manufactured in China by Cooper is:
27.72% (AD) + 12.5% (CV) = 40.22% + 4% = 44.22%.



Foxx Says USDOT Report Will Probe How Emerging Trends Affect Infrastructure

U.S. Transportation Secretary Anthony Foxx told the Transportation Research Board's annual meeting the nation needs to get beyond a short-term focus and repeated funding crises, to take a long-term view of how to prepare infrastructure for evolving demands that require action to head off problems in future decades.

"Let's just be honest: We've been moving from crisis to crisis" on funding infrastructure, Foxx said in his Jan. 12 keynote speech at the conference. He said in his 18 months as secretary Washington has seen budget sequestration, a government shutdown and a "highway cliff, part one" in last summer's near insolvency of the Highway Trust Fund.

Now, he said, "we may be facing part two" with a May 31 deadline fast approaching to replenish the trust fund again.

But Foxx told the TRB that a broader problem is a lack of long-term planning across different parts of the transportation network to guide project decisions. "In a real sense, our transportation system hasn't caught up to the 21st Century." He joked that "we've been planning like it's 1975."

Foxx said a 30-year planning study under way at the U.S. Department of Transportation will try to show trends in population growth, travel and emerging technologies and the demands these factors will put on the infrastructure.

Now, he said, "the infrastructure is falling apart, there's new capacity that's needed, but in too many cases we think of our infrastructure in pieces and not as a whole."

Foxx said part of the work of that long-term planning report, called "Beyond Traffic," is to look at the layered "system of systems" that make up the transportation network and anticipate some of the needs that system will be expected to handle.

"I think there are enough disruptive forces in transportation right now," he said, to require "a dispassionate look" at not just how much money is invested, but how and where that money is spent to deal with changing demographics.

He cautioned that it will not be a "prescriptive" or technical report that proposes specific measures, but one that will lay out the likely trends so decision-makers can incorporate them into transportation policies.

Foxx also said that report, once published in coming weeks, will also invite public comment to drive to stimulate more national conversation about infrastructure goals.

Michigan Senators Propose Keystone Bill Changes

Michigan's U.S. senators introduced two amendments to pending legislation intended to authorize the controversial Keystone XL pipeline, though it was a long shot that either proposal would be passed in the Republican-dominated chamber.

The Senate is currently considering the legislation, which President Barack Obama's administration has already signaled he could veto despite support in both chambers of Congress. The bill would authorize a pipeline crossing into the U.S. from Canada to move oil refined from tar sands in Alberta.

Michigan's senators — Gary Peters and Debbie Stabenow, both Democrats — oppose the pipeline but have introduced amendments which, if passed, could address related issues in Michigan regarding pipeline safety and the dangers of petroleum coke, a byproduct of oil refining.

A pile of pet coke along the riverfront in Detroit in the summer of 2013 caused widespread environmental concerns even though officials played down any dangers. Peters and Stabenow are calling for an amendment to the Keystone bill which would call for a study of the potential risks associated with pet coke.

A second amendment would require federal regulators to certify they have the necessary resources for proper oversight of pipelines in the Great Lakes before approving construction of the Keystone pipeline and call for recommendations to be developed to better ensure pipeline safety in the region.

Although the Keystone would not pass through Michigan, concerns about other Canadian-owned pipelines have been raised in the state in recent years. A pipeline break near Marshall in 2010 resulted in the largest inland oil spill in U.S. history, and some state residents are worried about an aging pipeline under the Straits of Mackinac.

"These amendments will give us the information needed to better understand the risks posed by the Keystone XL Pipeline," Peters said.

Rep. Gary Peters, D-Mich.,addresses the media at the United Auto Workers Local 1264 in Sterling Heights, Mich., Monday, March 3, 2014. Peters planned to put Republican Terri Land on the defensive in their U.S. Senate race by highlighting her 2012 opposition to the federal bailout of General Motors and Chrysler, which is widely credited with saving the U.S. auto industry.

"Since Canadian oil companies don't pay into the trust fund used to clean up oil spills, it's even more important that we make sure the pipelines owned by Canadian companies, like the Keystone Pipeline and the pipeline running under the Straits of Mackinac, are safe and that American taxpayers will not be forced to bail them out if a pipeline breaks," Stabenow added.

LETTER TO THE EDITOR

Dear SSDA-AT,

The 114th Congress was sworn with a clear pro-energy mandate. An election night poll found 90 percent of midterm voters agree that increased production of domestic oil and natural gas could lead to more U.S. jobs. Eighty-six percent recognize the connection between increased production and economic growth, which is their No. 1 priority.

This year's State of American Energy report emphasizes that the United States stands on the threshold of energy self-sufficiency at a level unthinkable just a few years ago. But achieving our full potential as an energy superpower requires getting energy policy right. Congress and the Obama administration should waste no time acting on the following job-creating energy policies: Keystone XL: We could have built the Keystone XL pipeline three times over during the six years the project has been under review. Five positive environmental assessments in six years have concluded the pipeline is safe for the environment, and the State Department says the pipeline will support 42,000 jobs putting $2 billion in workers' pockets during the two-year construction phase.

Renewable Fuel Standard reform: RFS implementation went from bad to worse last year. The EPA has already publicly acknowledged that it will be at least six months late in issuing 2015 standards that were due in November, and the agency failed entirely to issue standards for 2014 – which were due in November 2013. The only real solution is for Congress to scrap the program and let consumers, not the federal government, choose the best fuel to put in their tanks. Failure to repeal could put millions of motorists at risk of higher fuel costs, damaged engines, and costly repairs.

Access: While oil and natural gas production is thriving on private and state lands, it's slumping on federally controlled acreage and off limits entirely in 87 percent of federal waters. New studies show opening the Atlantic, Pacific and eastern Gulf of Mexico to development could create nearly 840,000 new American jobs and grow our economy by up to $70.2 billion per year.

To start the year with legislation guaranteed to create jobs and grow the economy, the new Congress should move quickly to advance these commonsense energy policies.

Sincerely,
Jack Gerard
President and CEO
API

energy API

Republican Hints at Keystone Backup Plan

Republicans have a backup plan for approving the Keystone XL oil pipeline if President Obama vetoes the bill now moving through the Senate, a top House Republican suggested Wednesday.

House Rules Committee Chairman Pete Sessions (R-Texas) struck a positive tone about the pipeline fight in a radio interview, suggesting the GOP could have other ways to secure a veto-proof majority for the pipeline.

"He may veto this thing and we may not have the votes to overturn it, but he is going to see it on a transportation infrastructure bill and we're going to give it to him with 400 votes," Sessions said on the Dallas-Fort Worth-area "Mark Davis Radio Show."

"We are going to get Keystone pipeline because, Mark, it represents so many attributes that we've been fighting about and that Americans need."

Senators are working through a series of amendments to a Keystone bill that passed the House earlier this month, with work expected to stretch on for weeks under Majority Leader Mitch McConnell's (R-Ky.) "open amendment" process.

While the Keystone bill is expected to pass, the White House has made clear that Obama will veto it, arguing the State Department's review of the Canada-to-Texas pipeline should be allowed to run its course.

Republicans appear short of the two-thirds majority they would need in the House and Senate to override a veto, but have other tools for trying to revive the fight in the months ahead.

If they could get a Keystone provision into a larger transportation bill that passes Congress, it would create a tough choice for Obama, who has repeatedly stressed the need for spending on infrastructure.

Reacting to Obama's State of the Union speech, Sessions also said that the Senate should use every available option to pass measures overturning the president's executive actions on immigration.

"Let's not kid ourselves, it takes 60 [senators] or, they have to go through a deliberative process," he said on the radio show, recounting a conversation he had with Sen. Ron Johnson (R-Wis.).

"I said, 'Go through the deliberative process, you do whatever it takes. We've done our job.' "
Sessions helped shepherd last week's bill defunding the president's actions through the House, where it passed on a near party-line vote. Ten Republicans voted against the measure, which would halt deferred deportations for millions of illegal immigrants who can now apply for work permits.

The funding bill for the Department of Homeland Security, which was the vehicle Republicans used to combat the executive action, would also roll back the Deferred Action for Childhood Arrivals Program, which defers deportations for some people who arrived in the United States as children.

While the DHS measure flew through the House, the path ahead is uncertain for Senate Republicans.

GOP lawmakers could try to woo Democratic colleagues to support the DHS bill by granting them amendments, but even then it's unlikely they would have enough support to break through a Democratic filibuster.

Still, Sessions said that he's happy the new leaders in the upper chamber will force debate on the issue.

Treasury's Lew Lists Oil, Gas Producers as Prime Tax-Reform Target

US Sec. of the Treasury Jack Lew signaled the Obama administration's fresh intention to seek repeal of federal tax provisions US oil and gas producers consider essential to their businesses as part of its comprehensive business tax-reform plan.

President Barack Obama wants to reform business taxes to help fuel economic growth; encourage businesses to create good, high-paying US jobs; and expand opportunities so the nation's economic gains build a strong middle class, Lew said in a Jan. 21 address at the Brookings Institution.

"Over time, our tax code has become increasingly loaded down with special interest loopholes, deductions, and assorted tax subsidies," Lew said. "Some were good ideas whose time has now passed; others were special-interest giveaways from the beginning. The end result is a system rife with industry-specific tax breaks and widely disparate effective tax rates from one sector to the next, often providing incentives that do not reflect what our economy needs today."

He said, "For instance, oil and gas producers are rewarded with a number of special-interest tax breaks that unfairly reduce the taxes of oil companies far below what other industries, like retail and manufacturing, pay on their earnings."

An American Petroleum Institute official immediately challenged the secretary's characterization.

"[He] needs to get his facts straight," API Tax and Accounting Policy Director Stephen Comstock said. "America's oil and gas companies pay considerably more in taxes than the average manufacturing company. And we use the same kind of cost-recovery deductions that are available to every other industry to reinvest money back into the economy."

Helped create jobs

Comstock said the ability to recover costs through ordinary tax deductions has let the US oil and gas industry create millions of middle-class jobs and make America the world's leading energy producer.

"History has shown that the people most hurt by higher taxes that increase the cost of energy production are lower-income and middle-class Americans," Comstock said.

For years in its annual federal budget proposal, the White House has proposed repealing provisions such as intangible drilling cost deductions, the percentage depletion allowance, and the passive loss exclusion which producers consider important business costs but critics in the administration and Congress regard as tax breaks.

"Keep in mind loopholes, credits, and subsidies are forms of tax expenditures," Lew said. "They are spending that is done through the tax code, and because they represent lost tax revenue, we all help foot the bill for these expenditures."
He conceded that provisions such as the Earned Income Tax Credit, expensing for small businesses, and the Research and Experimentation Tax Credit are worthwhile and should be preserved.

"But these tax incentives cost money and need to be paid for to maintain adequate revenue levels," Lew said. "And we cannot apply a double standard, as some have proposed, where we permanently extend business provisions without paying for them."

The Return of 'Hot Fuel'

KANSAS CITY, Mo. – After several years of litigation, a federal district court in Kansas City, Mo., has given preliminary approval to settlements with 28 defendants in a consumer class-action lawsuit concerning what has come to be called "hot fuel"--how gasoline and diesel motor fuel are sold at retail gas stations with regard to temperature.

The plaintiffs in the case before U.S. District Court Judge Kathryn H. Vratil said customers are short-changed when buying gasoline that is over 60 degrees. Proponents of automatic temperature compensation (ATC) devices claim that consumers are getting less than a gallon of fuel for a full gallon price.

In July 2009, the National Conference on Weights & Measures (NCWM) rejected measures to require or allow ATC for retail fuel dispensers. It cited consensus against ATC as well as economic cost factors, lack of consumer benefit and absence of uniformity in the marketplace as reasons for its decision, according to NATSO, the National Association of Truck Stop Operators.

The settling defendants are B-B Oil; BP Products North America and BP West Coast Products (BP); Casey's General Stores; Chevron U.S.A.; CITGO Petroleum; ConocoPhillips; Coulson Oil; Dansk Investment Group (formerly USA Petroleum); Diamond State Oil; ExxonMobil, Esso Virgin Islands and Mobil Oil Guam (ExxonMobil); E-Z Mart Stores; Flash Market; G&M Oil; J&P Flash; Love's Travel Stops & Country Stores; Magness Oil; M. M. Fowler; Port Cities Oil; Sam's Club; Motiva Enterprises and Equilon Enterprises dba Shell Oil Products US (Shell); Sinclair Oil; Sunoco (R&M); Tesoro Refining & Marketing; Thorntons; United El Segundo; Valero Marketing & Supply; World Oil; and W.R. Hess.

The settlements cover persons and entities who purchased motor fuel after Jan. 1, 2001 (for 24 settlements), or after Jan. 1, 2004 (for four settlements), in the following states and jurisdictions: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, DC., Guam and the Virgin Islands.

There is a separate proposed settlement for each company, and each settlement may not cover all of the states and jurisdictions.

The settlements cover persons and entities who purchased motor fuel after Jan. 1, 2001 (for 24 settlements), or after Jan. 1, 2004 (for four settlements).

Six of the companies (BP, Chevron, ConocoPhillips, ExxonMobil, Shell and Sinclair) will collectively pay $22.925 million into funds to reimburse retailers for the costs of installing equipment that corrects for the effects of temperature on motor fuel and to help state officials who oversee the retail sale of motor fuel make sure that any changes in how motor fuel is sold are done lawfully.

Settlements with 18 companies, which total $1.577 million, fund only the second activity.

A portion of the settlement funds may be used to cover costs, including the costs of providing notice to class members and legal fees.

The other four settling companies (Casey's, Dansk, Sam's Club and Valero) have agreed to gradually convert a portion of their existing and new stations, where permitted by state law, to fuel pumps that can adjust for the effects of temperature.

The proposed settlements provide no money directly to consumers who have purchased retail motor fuel. In settling, the companies are not admitting any liability or conceding that the claims have merit, according to the court documents.

The court has scheduled a hearing for June 9, 2015, to determine whether to give final approval to the settlements

LEGISLATIVE UPDATE

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In his State of the Union Address, President Obama proposed to raise $320 billion over the next 10 years in new taxes.

Specifically, the President is proposing to raise the capital gains tax and dividend tax rates to 28%, impose a fee on the liabilities of large financial institutions, repeal LIFO and greatly increase the estate tax.

SSDA-AT will oppose an increase in the capital gains, dividend, and estate tax rates; and will oppose the repeal of LIFO.

To offset the tax increases on business and "wealthy" individuals, the President will seek additional reforms that will aid middle class and working families, including:

- **Propose a new, simple tax credit to two-earner families.** The President will propose a new $500 second earner credit to help cover the additional costs faced by families in which both spouses work – benefiting 24 million couples.

- **Streamline child care tax incentives to give middle-class families with young children a tax cut of up to $3,000 per child.** The President's proposal would streamline and dramatically expand child care tax benefits, helping 5.1 million families cover child care costs for 6.7 million children. The proposal will complement major new investments in the President's Budget to improve child care quality, access, and affordability for working families.

- **Simplify, consolidate, and expand education tax benefits to improve college affordability.** The President's plan will consolidate six overlapping education provisions into just two, while improving the American Opportunity Tax Credit to provide more students up to $2,500 each year over five years as they work toward a college degree – cutting taxes for 8.5 million families and students and simplifying taxes for the more than 25 million families and students that claim education tax benefits.

- **Make it easy and automatic for workers to save for retirement.** The President will put forward a retirement tax reform plan that gives 30 million additional workers the opportunity to easily save for retirement through their employer.

These new policies build on longstanding proposals to extend important tax credit improvements for working families, expand the Earned Income Tax Credit, provide quality preschool for all four-year-olds, and raise revenue to reduce the deficit by curbing inefficient tax breaks that primarily benefit the wealthy. In addition, the President has put forward a framework for fixing the business tax system on a revenue-neutral basis and using the transition revenue to pay for investments in infrastructure.

The Estate Tax proposal drew immediate oppo-

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sition from both Republicans and Democrats who recently worked on legislation, signed into law by the President, to increase the amount of money exempt from inheritance taxes, commonly referred to as "death taxes".

Senate Majority Leader Mitch McConnell (R-KY) responded, "President Obama is asking Congress to reverse bipartisan tax relief that he signed into law."

"FULL TIME" EMPLOYMENT

While repealing Obamacare is politically a longshot, SSDA-AT and other small business associations are pushing for legislation to change the definition of "full time employment" under the Patient Protection and Affordable Care Act (ACA).

U.S. Congressman Todd Young (R-IN), and Dan Lipinski (D-IL), with the support of Senate colleagues Pete Olson (R-TX), Mike Kelly (R-PA), and Time Walberg (R-MI), introduced H.R. 30, the Save American Workers Act of 2015.

If enacted, H.R. 30 would repeal the ACA's 30 hour definition of "full time employment" and change it to a more 40 hour definition.

ACA stipulates that employers with more than 50 full time employees are required to provide employees with a basic level of health insurance or potentially face a penalty.

ACA defines a full time employee as an individual who works an average of at least 30 hours a week. This requirement has created an incentive for employers to cut workers' hours to less than 30 hours a week to avoid the insurance requirement and the potential fine.

SAVE THE DATE!!!

The annual Convention and Mega Trade Show will be held in Ocean City, Maryland

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troduces legislation to reduce the tax on widget sales to 5%. Simplifying things a bit, using static scoring, this legislation would be predicted to cost the government $10 million – cut the tax rate in half, cut the revenue in half. Using dynamic scoring the legislation would be calculated as costing the government the difference between $10 million and the additional revenue that will be raised based on changes that the legislation will have on economic behavior – such as the additional taxes that will be brought in if the cut in taxes causes an overall increase in widget sales.

The House vote on H. Res. 5 split clearly along party lines. One of the primary reasons for the partisan divide is that, as enacted by the House, the dynamic scoring rule will only apply to "major" pieces of legislation which are defined pieces of legislation that are expected to have an economic impact of more than .24 percent of the estimated annual GDP. The Democrats argue that only a comprehensive tax reform bill would meet this threshold and that Republicans are promoting this dynamic scoring method as a means of making their tax reform proposals, which, based on traditional party principals, are expected to involve numerous tax cuts, look more favorable (and less expensive).

Tax Reform

Between the House rule change and direct statements by leadership, neither party has made it a secret that tax reform is one of their top priorities this year. The consensus that something needs to be done on the tax code is not new. Unfortunately, in past years, despite this general interest in action, the parties have been unable to overcome the significant ideological divide that comes into play with tax reform. It is yet uncertain whether the parties are still too far apart and unwilling to compromise on key issues as would be necessary to accomplish any meaningful reform this year.

Fueled in part by concerns of corporate inversions, the President has called for an overhaul of the tax code. In the few days leading up to last night's State of the Union, the President began to articulate specifics about what some of these reforms might look like. Stay tuned for another report which will discuss these proposals as well as other issues raised by the President during the State of the Union.

The President is not the only one focusing on the corporate side of the tax code. While House Ways and Means Committee Chairman Paul Ryan (R-WI) initially began the new session indicating his interest in full scale reform of the tax code, in the past few days, he has stated that he and his committee members will be considering the option of pursuing a corporate-only tax reform plan.

It will be interesting to see how Chairman Ryan will resolve the concern, previously raised by his party, that corporate-only tax reform would leave out many small businesses that are taxed at the individual level since they are pass-through entities. One possible solution to this issue has already been presented this session by Ways and Means Committee member Congressman Devin Nunes (R-CA). Congressman Nunes' draft legislation, which mirrors a proposal he previously made in 2012, would replace the corporate tax system, including all credits and deductions, and simply set a 25% tax rate for all businesses, regardless of their organizational structure.

House democrats have also begun to move forward in promoting their own ideas on tax reform spearheaded by House Budget Committee Ranking Member Congressman Chris Van Hollen (D-MD). Earlier this week, Congressman Van Hollen rolled out his "Action Plan to Grow the Checks of All, Not Just the Wealth of a Few."

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Among other things, the action plan includes proposals to:

- implement a tax credit of $1,000 per worker per year, phased out at an individual income of $100,000, to offset the preferential treatment of capital gains and other non-wage earnings;
- introduce a "Saver's Bonus" providing a bonus of $250 for each individual who contributes at least half their Earned Income Tax Credit (of $1,000) to a tax preferred savings account;
- continue to promote the principles set forth in CEO-Employee Paycheck Fairness Act, introduced by Congressman Van Hollen in 2014, which would tie a publically traded corporation's ability to claim a deduction for compensation paid to executives to the pay of its non-executive employees;
- provide tax credits to incentivize businesses to establish job training or apprenticeship programs; and
- introduce a 20% tax deduction on income up to $60,000 for second earners in a family with dependents.

At this point, Congressman Van Hollen's action plan remains just that and has not yet been introduced in the form of a bill or bills this session.

While, in the House, Republicans and Democrats have gone their separate ways in preparing their initial tax reform proposals, a different approach seems to be taking form in the Senate. On January 15, 2015, Finance Committee Chair Orin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR) announced that they will be forming five bipartisan tax reform working groups in the Committee to assess current tax issues and the potential for reform. These five working groups will be focused on 1) Individual Income Tax; 2) Business Income Tax; 3) Savings & Investment; 4) International Tax; and 5) Community Development & Infrastructure.

Recent attempts by the House Ways and Means Committee to use bi-partisan working groups to develop tax reform proposals have had a limited result. However, the good working relationship that Senators Hatch and Wyden appear to have developed, as well as the Senate's reputation as the more measured and deliberative body, gives some promise to the Finance Committee's efforts. While past working groups have moved at a relatively slow pace, any bi-partisan recommendations coming out of the Senate Finance Committee are sure to receive serious considerations on both sides of the aisle as well as both sides of the Hill.

Listening to Senator Hatch as he delivered a major speech yesterday at the U.S. Chamber of Commerce, it seemed clear that tax reform will be a major priority for both the Senator and the Finance Committee. In his speech, the Senator reviewed the major goals that tax reform must achieve, including revenue neutrality, permanence, simplicity, promotion of savings and investments, a broadening of the tax base in order to lower the tax rates, and increasing American competitiveness. The Senator mentioned that he believes that bipartisan, bicameral tax reform could be achieved, but mentioned that tax reform is so important that if the Republicans have to go it alone then they would do so. The Senator also mentioned that he was very interested in getting his retirement plan legislation out of the Finance Committee this year. Finally, the Senator noted that he is committed to finding a solution to the problem of finding funding for rebuilding our infrastructure, but that he thought a gas tax increase would be highly unlikely.

Overall, it is clear that tax reform will be a central

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issue this year. However, the odds of success still appear lower than we would like.

Extender Items

Unfortunately, the broader focus on comprehensive tax reform has drawn attention away from the specific tax provisions that expired at the end of 2014 (many of which actually expired at the end of 2013, and were extended through the end of 2014 just a few weeks before the end of the year).
Large scale tax reform could theoretically resolve each of these extender items by either extending them, making them permanent or eliminating them. However, as discussed above, comprehensive tax reform is a very lofty, and perhaps unattainable, goal for this Congress and President, and will certainly not be a swift process. Thus, we are concerned that, taxpayers, including small businesses, will face another year of uncertainty and be forced to make important decision without certainty as to what will happen with these expired provisions.

The Keystone Pipeline:

While there will inevitably be partisan splits in the future, at this point, tax reform is perhaps the least controversial of the major issues that have already been raised in the new Congress. On the other side of the spectrum, the Keystone pipeline issue, which was raised on the first day of session, kicked off serious disagreement that is continuing to occupy congressional attention. While the pipeline's direct impact on most small businesses seems to be limited, the growing dynamic between Congress and the White House on this high profile issue is sure to influence the tone of debate on other issues being considered contemporaneously.

On the first day of the new session, bills were introduced in both the Senate (S.1) and the House (H.3) to authorize the building of the TransCanada Keystone Pipeline.

The pipeline is not a new issue, as it has been under consideration for six years. However, recent developments have swiftly moved it to the forefront of political debate.

Almost a year ago, on January 31, 2014, the State Department published its Final Supplemental Environmental Impact Statement on the pipeline concluding, in short, that the pipeline would not have a significant effect on greenhouse gas emissions because, without the pipeline, the oil would be transported by other means. However, in May 2014, the State Department suspended its broader review of the pipeline pending the resolution of a lawsuit making its way through the Nebraska courts.

On January 9, 2015, the Nebraska Supreme Court decided the case at issue by overturning a lower court ruling and holding that legislation passed by the Nebraska legislature allowing for the construction of the pipeline through the state was not unconstitutional. In other words, the Nebraska Supreme Court decision cleared a major hurdle for the proposed developers of the pipeline.

Just hours after the decision was handed down, the House passed H.3., the third time in six months that it has passed a bill authorizing the pipeline. The bill passed the House with the votes of nearly all of the Republican members

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and 28 Democrats. The issue now moves to the Senate which began debate on amendments to S.1 yesterday. Given the support that the pipeline received during the lame-duck session in November 2014 (falling one vote short of the 60 needed) and the current partisan breakdown of the chamber, the bill is expected to pass the Senate. However, the White House has already pledged that the President will veto such a bill. It appears that the Administration will not respond to Congressional pressures and will instead continue to move forward with the administrative review process, the timing of which is currently uncertain. If the bill does pass the Senate and is vetoed by the President, it seems unlikely there will be enough votes in Congress (given the results of the House vote) to override the veto – though the issue could be close.

This face off, straight out of the gate, between the Republican majority in Congress and the White House, has made two things clear: first, congressional leaders are not going to be concerned with niceties and will not hesitate to promote their agenda even in the face of presidential opposition; and second, that the White House has clearly recognized, and will not hesitate to act on, the math problem that the Republicans have in overcoming a presidential veto. With no elections for a year and a half and no re-election for the President to worry about, at the moment, both parties appear less concerned with being saddled with the blame for legislative inaction than they were leading up to 2014 mid-term election. Unfortunately, this may translate into both parties being less willing to compromise and establishing an early dynamic of gridlock that will be hard to step back from.

Homeland Security

Funding and Immigration

Another area where the White House and the Republicans are already facing off is funding for the Department of Homeland Security (DHS). The compromise spending bill that was passed in December 2014 came with one major caveat – the bill only funds the DHS through February 27, 2015, while funding the rest of the government through September 2015. This point of compromise reflected the Republican's goals at the time of avoiding a fast approaching government shutdown while forestalling a final decision on how the party will respond to the Executive Actions on Immigration announced by the President on November 20, 2014.

On January 14, 2015, the House passed H.R. 240 which would fund the Department of Homeland security. However, to the legislation were added a number of amendments which would, among other things, reverse the President's November Executive Action as well as prior Presidential immigration directives. The amendments also eliminate funding for the Deferred Action for Childhood Arrivals program which provides individuals under age 35 who were brought to the U.S. illegally before the age of 16 and who have lived in the U.S. continually for five years (often referred to as "DREAMers") protection from deportation and the opportunity to apply for work permits and social security numbers. Clearly these amendments have met with immediate opposition from Congressional Democrats and the White House.

This issue will continue to be drawn out and remain unresolved over the course of the next few weeks as the bill moves to the Senate where Majority Leader Mitch McConnell (R-KY) has stated that

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he does not intend for the Senate to consider the bill until February. Particularly in the wake of last week's terrorist attack in France, funding for homeland security programs is a top issue (and public relations priority) for both Democrats and Republicans. The President will be very reluctant to accept such major changes to his immigration policy, particularly without any alternative proposals for immigration reform currently on the table. With the Senate's consideration of the funding bill in February, Republicans will be faced with the question of whether using DHS funding as the vehicle to face off with the President on immigration is worth the potential risk of being painted as the party playing politics with funding for a crucial agency.

Affordable Care Act

As expected, taking aim at another area near and dear to the President, the Republican Congress has also hit the ground running with efforts to amend and scale back the Affordable Care Act (ACA).
First, on January 8, 2014, the House passed the Save American Workers Act (H.R. 30) which would change the ACA's definition of "full time" from an employee who works at least 30 hours per week to one who works at least 40 hours per week. The House bill received support from 12 Democratic members. A similar bill (S.30) has also been introduced in the Senate by Senators Susan Collins (R-ME) and Joe Donnelley (D-IN), however, no timing has yet been announced for its consideration.

While it was previously a matter of speculation as to how receptive the President might be to a reform of the full time definition, the White House made it clear last week that the President will veto this bill if it makes its way to his desk. A new report from the non-partisan Congressional Budget Office which states that the 30 hour to 40 hour change would increase the deficit by $53 billion over the next 10 years may also impact the likelihood of the bill receiving sufficient bi-partisan support in the face of a presidential veto. Thus, unless the President changes his mind about vetoing the bill or the 30 hour to 40 hour amendment comes into play as a bargaining chip in some other debate, both of which are quite unlikely, we think it unlikely that we will see the ACA's full time definition changing this year.

Another pair of proposed changes to the ACA, much more likely to make their way into law, were passed unanimously by the House on January 6, 2014 and January 12, 2014. The first, H.R. 22 would exclude veterans who receive health coverage through programs administered by the Department of Defense from the definition of full-time employees for the purposes of calculating whether an employer is covered by the ACA's employer mandate. The second bill, H.R. 30 would also exclude volunteer fire fighters from the definition of full-time employees, meaning that these volunteers would not be counted in determining whether government or non-profit fire departments are subject to the ACA's employer mandate. H.R. 30 is similar to a bill that was passed in the House last year but that was then stalled in the Senate after Democrats attempted to attach an amendment dealing unemployment insurance to the bill. With Republicans in control of the Senate now, we expect that, if put forth in the form passed by the House and kept clean of controversial

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amendments, both of these bills will pass the Senate with little resistance. The White House has not indicated whether the President would veto the bills, however, depending on how the votes in the Senate come down, it may not be worth the President's political capital to veto as it is clear that, at least in the House, where 412 members voted for H.R. 22 and 410 members voted for H.R. 30, a veto will not prevent this bill from becoming law.

The next big ACA issue currently cuing up in the House is an effort to repeal the ACA's medical device tax. On January 6, 2015, Congressman Erik Paulson (R-MN) introduced the Protect Medical Innovations Act of 2015 (H.R. 160) which would repeal the 2.3% tax on the sale of medical devices. While the idea of repealing the medical device tax may have some bi-partisan support, the big question that remains is how (and if) to offset the $30 billion cost to the government that would result from a repeal. As currently drafted, H.R. 160 does not include an offset. At this stage, the President has not yet indicated whether he would be willing to consider a repeal of the medical device tax either with or without an offset. As the medical device tax is currently the key revenue raiser in the ACA, it seems unlikely that the President would be willing to accept its repeal without any offset.

As expected, on the first day of the Congressional session, a bill (H.R. 132) was introduced in the House to repeal the ACA. However, at this point it is clear that such an effort has virtually no chance of success with the current Congress and President. Instead, the mainstream debate on ACA has been centered on reforms instead of repeal, which we expect to be a continuing theme throughout the 114th congress.

Doc Fix

Also in the area of health care, there is an important issue that Congress, despite its divide ,will have to come together to address sooner than later. This issue is the Medicare physician payment system for which the temporary "doc fix" that we reported on last spring is set to expire on March 31, 2015.

Since the 1990s, Medicare reimbursements have been calculated using the "sustainable growth rate" (SGR) method – at least in theory. In fact, although the goal of the SGR was to curb Medicare costs, the pay cuts to doctors caused by the SGR are so dramatic that Congress has annually (or even semi-annually) voted to appropriate additional funds to maintain Medicare reimbursement rates (what we have come to known as the "doc-fixes").

There was some optimism last year that legislation would be passed to eliminate the SGR and replace it with a value-based payment system, which proponents have emphasized will move Medicare away from a fee-for-service model and promote better health results. Unfortunately, no long term compromise was reached and a temporary fix was passed instead, kicking the issue down the proverbial road where we now find ourselves today. Members on both sides of the aisle recognize that, once again, some action will need to be taken to address this issue. House Republicans have indicated that they will seek to pass a permanent fix by April 1, 2015. However, similar goals were set last year and the parties were still unable to come together on anything other than a short term fix.

E-Cigarette Tax Bills: Round 2

MINNEAPOLIS – Last year, 12 state legislatures considered bills that would have assessed a tax on electronic cigarettes and/or the nicotine liquid solution used in electronic cigarettes. Only North Carolina enacted a new tax equal to five cents per milliliter of nicotine solution.

During January of this year, eight bills have been introduced in eight state legislatures to assess a tax on e-cigarettes or the nicotine liquid solution used in e-cigarettes. These proposed tax bills include the following:

Arkansas: House Bill 1156 would assess a tax of 7.5 cents per milliliter of nicotine liquid solution.

Indiana: Senate Bill 384 would tax e-cigarette vapor products at a rate of .83 cents per milligram of nicotine in each milliliter of nicotine liquid solution.

Nevada: Senate Bill 79 assesses a tax on nicotine liquid solution at the rate of 30% of the wholesale price.

New Mexico: Senate Bill 65 taxes a tax of four cents per milligram of liquid nicotine liquid solution in an electronic cigarette.

New York: Assembly Bill 296 and Senate Bill 722 tax electronic cigarettes and electronic cigarette cartridges at a rate of 75% of the wholesale price.

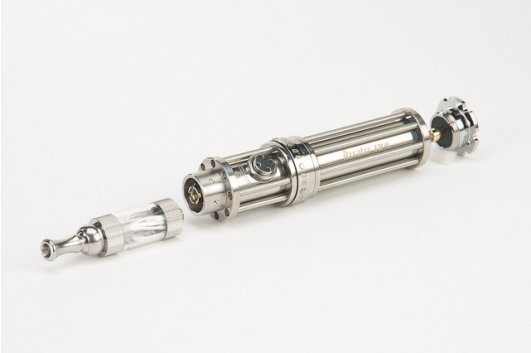
Oregon: Two bills, D1037 and D2268, would expand the definition of tobacco product for purposes of taxation to include electronic cigarettes and nicotine liquid solution in order to apply the state's tobacco tax rate of 65% of the wholesale price.

Virginia: House Bill 1310 imposes a tax on electronic cigarettes and other vapor products at a rate of 40 cents per milliliter of nicotine liquid solution.

Washington: House Bill 1645 and Senate Bill 5573 would impose a tax on electronic vapor products at a rate of 95% of the taxable sales price.

With many state legislative sessions just beginning this month, plus four state legislatures that open their 2015 legislative sessions in the next month or two, there could be bills introduced in other states to propose a tax on electronic cigarettes or the nicotine liquid solution used in electronic cigarettes.

Currently, only Minnesota and North Carolina tax the sale of electronic cigarettes with Minnesota assessing a tax rate of 95% of the wholesale price and North Carolina assessing a tax rate of five cents per milliliter of liquid nicotine solution.



GENERAL COUNSEL CORNER

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quirement contained in Part II of the PMPA that gasoline retailers "display in a clear conspicuous manner, at the point of sale to ultimate purchaser of automotive fuel, the automotive fuel rating of such automotive fuel," and its preemption provision prohibiting states from enacting laws that are inconsistent with any provisions of Part II.

The appeals court concluded that the consumers, by seeking to compel the refiners to add a corrective disclosure at the pump warning customers about the residual fuel situation, were in effect "challenging the accuracy and undermining the uniformity of federal octane labeling regulations." This the PMPA would not allow.

A second class action suit, brought in the name of a Missouri consumer, tried a different tack. In order to avoid what she apparently thought would be a hostile reception in federal court, the consumer filed a state law claim charging only local marketers with misrepresenting the grade of gas pumped at their stations.

The marketers removed the case to federal court anyway, arguing that their defense of PMPA preemption created an independent basis for federal jurisdiction. The district court agreed with the marketers, and refused to remand the consumers claim back to state court.

In a 2-to-1 decision in *Johnson v. MFA Petroleum Co.,* 701 F.3d 243 (8th Cir. 2012), the Eighth Circuit Court of Appeals reversed the district court, emphasizing that PMPA preemption has its limitations.

The appeals court based its opinion on the distinction between "ordinary" and "complete" preemption. In the "ordinary" case, preemption may be raised as a defense in state court but it does not nullify the existence of state court jurisdiction so as to justify removal to federal court. Following Supreme Court guidance, the majority opinion concluded that "complete" preemption justifying removal exists only where a federal statute "so completely pre-empt[s] a particular area that any civil complaint raising the select group of claims is necessarily federal."

In drawing a line between "ordinary" and "complete" preemption, the majority opinion emphasized that Part II of the PMPA provides for enforcement exclusively by the Federal Trade Commission, thus leaving a consumer with no alternative federal remedy. This is different from Part I of the PMPA, which might support a claim for complete preemption because Congress provided an express remedy for damages and injunctive relief to impacted dealers.

The court of appeals concluded that "without a federal cause of action which in effect replaces a state law claim, there is an exceptionally strong presumption against complete preemption." That is because it is doubtful that Congress, through preemption, would strip a litigant of his or her rights under state law without providing at least some federal remedy.
Although the appellate decision favored the consumer, it was far from a complete victory. The court of appeals directed the district court to consider whether another federal statute, the Class Action Fairness Act, provided an independent basis for removal to federal court.

Even if the consumer surmounted that hurdle, she would still be faced with the doctrine of "ordinary" preemption in state court. The state court might well be swayed by the Ninth Circuit's opinion in *Alvarez* establishing the "ordinary" preemptive effect of Part II of the PMPA over false advertising claims.

The bottom line appears to be that consumer hose claims face considerable procedural and substantive obstacles, not the least of which is PMPA preemption.

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To access the latest articles by the Service Station Dealer's legal counsel, please visit the "Service Station Dealers: Legal Issues" section of the Astrachan Gunst Thomas, P.C. website at: http://www.agtlawyers.com/resources/petroleum.html.

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