FEDERAL POLICY UPDATE

AMERICAN SENIORS HOUSING ASSOCIATION
Living Longer Better

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» TAX REFORM A LONG SHOT IN 2016 BUT HEARINGS AND LEGISLATION OFFER A GLIMPSE OF THINGS TO COME

Despite being overshadowed in the media by the presidential primaries, congressional work in Washington continues, even if it is at a slow pace. In the House, Speaker Paul Ryan's task forces are meeting regularly on the details of a Republican policy agenda. The Tax Reform Task Force has been particularly active, holding weekly meetings and scheduling multiple hearings aimed in part at providing House members who do not serve on the Ways and Means Committee an opportunity to provide input on the direction of tax reform. A hearing to examine cash flow and consumption-based tax reforms was held on March 22nd, and a hearing on proposals to alter income-based taxation will occur on April 13th. Of particular concern to the real estate industry are proposals that would limit the ability to deduct interest expenses. A broad-based business coalition is working to ensure that lawmakers understand that interest is a cost of doing business and that proposals to limit its deductibility would jeopardize jobs and stifle economic activity.

Even though neither chamber has been able to reach a consensus on an overall budget resolution, the House and Senate appropriators have already begun working on the details of appropriations bills. They plan to write the annual government spending bills based on last fall's bipartisan budget agreement. And, Senate Majority Leader Mitch McConnell still says he plans to begin moving appropriations bills though the Senate in April.

Still, the most active place in Washington appears to be the Executive Branch. The Obama Administration is continuing to churn out regulations, many of them controversial. The Department of Labor (DOL) released its persuader rule in final form in March, and the final overtime rule is expected to be released in the next couple of months.

» DOL MOVES FORWARD ON CONTROVERSIAL REGULATIONS

Final DOL Union "Persuader" Regulation Released; Republican Committee Chairs Oppose

On March 23rd, DOL released a final regulation that requires employers to disclose agreements with the consultants they hire to develop and implement their message in union organizing campaigns. Currently, disclosures are required only when consultants have communicated directly with workers. However, under the new rule, employers and consultants will have to disclose indirect activities such as (1) training supervisors or employer representatives to conduct meetings, (2) coordinating or directing activities of supervisors or employer representatives, (3) drafting, revising, or providing speeches, (4) developing employer personnel policies designed to persuade employees, and (5) identifying employees for reward or other targeting. All parties will also have to disclose the amount of fees involved. The new rule will take effect July 1st.

On the same day the persuader rule was released, the Chairs of the two congressional committees with jurisdiction over labor matters issued press releases criticizing the Administration for rolling out policies that benefit unions at the expense of employers and their workers. House Education and the Workforce Committee Chairman John Kline (R-MN) vowed to "push back against this rule," and Senate Health, Education, Labor and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN) promised to work on ways "to prevent this rule from causing harm to America's workplaces."

In addition several business groups including the National Association of Manufacturers (NAM) field a lawsuit against the Labor Department seeking an injunction to block the regulation from taking effect next month.

DOL Releases Final Rule on ERISA Fiduciary Redefinition

On April 7th, the DOL released a long-anticipated rewrite of the fiduciary definition under ERISA. The revised definition will substantially expand the types of activity that will trigger fiduciary status with respect to investment advice in connection with employer-sponsored retirement plans and IRAs. The new rules will now also apply to advice with respect to rollovers from an employment-based plan to an IRA. For the most part, the burdens of compliance with the new rules will fall on the financial institutions that administer retirement plans and IRAs. Employers that sponsor retirement plans will, for the most part, only be tangentially affected. However, a serious concern with the rules as originally proposed was that they would have made it impossible for "commission-paid" investment advisors to recommend investments in non-publicly traded REITs. That is because the original DOL proposed exemption for certain commission-based investments was limited to a list of "plain vanilla" investments. Now, the DOL has in its final rule announced that there will be "no prescriptive list" of permitted investments for purposes of the exemption for commission-based fees. That means that brokers and other investment advisors will still be able to recommend the investment of retirement assets in non-publicly-traded REITs and be paid by commission. However, under the new rules those investment advisors would have to meet a higher "fiduciary" standard with respect to the investment advice they provide (including ensuring that the advice was in the "best interests of the advice recipient" and that their fees were reasonable). In addition, the investment advisor would have to disclose its fees and meet a number of other conditions to qualify for the exemption.

Congress Responds as DOL Final Overtime Regulation Advances

The DOL has completed its work on a regulation that would increase the income level at which workers automatically qualify for overtime and has sent the regulation to the Office of Management and Budget (OMB) for review. This review generally is the last step in the regulatory process before the final product is released to the public. The final regulation was received at OMB on March 14th and, based on customary review times at OMB, it will likely be released in final form in May or June.

DOL Secretary Thomas Perez recently testified before three congressional committees and was grilled on the overtime regulation at each. Numerous committee members expressed dismay that the proposed regulation would more than double the current overtime pay exemption threshold. The Secretary avoided discussions of any of the details by citing the fact that the final regulation was still under review.

Some Members of Congress (including key Committee Chairs Lamar Alexander and John Kline) have taken their concerns a step further and introduced legislation that would invalidate the DOL overtime rule. Nonetheless, the prospects for derailing the overtime regulation (and other regulations) in this Congress are not good. In anticipation of the final rules being released ASHA is developing materials to assist members companies with the new compliance requirements.

Members of Congress Urge House Appropriators to Block Four DOL Initiatives

As reported last month, ASHA has been working with our partners in the CDW to urge Congress to use the appropriations process to block National Labor Relations Board (NLRB) decisions in four areas – the joint employer standard, the ambush elections rule, micro-unions that force management of multiple bargaining units – and to stop implementation of the Department of Labor's "persuader" rule. We are pleased to report that 73 members of the House of Representatives wrote to House Appropriations Committee leaders asking them to include provisions in the next fiscal year's spending bill that would stop the Administration's actions on these four issues. The letter argues that each of the four matters are of "equal importance in addressing the drastic labor law changes put forth by the NLRB and DOL that have proven so harmful to employers and employees alike," and that failure to address these issues through the appropriations process will result in economic uncertainty for "millions of American employers, workers, and consumers."

» FEDERAL TAX POLICY

Ways and Means Committee Members Propose Tax Credit for Caregiving Expenses

Ways and Means Committee members Tom Reed (R-NY) and Linda Sanchez (D-CA) recently introduced legislation (H.R. 4708, the Credit for Caring Act) that would provide a tax credit for working family caregivers equal to 30% of a caregiver's expenses in excess of $2,000. The amount of the nonrefundable credit would be capped at $3,000.

Eligible expenses would include goods, services, and support purchased by the caregiver to assist with activities of daily living. An eligible care recipient includes a family member who is the taxpayer's spouse, parent, grandparent, sibling, child, niece or nephew, brother-in-law or sister-in-law, father-in-law or mother-in-law, or aunt or uncle. The recipient must be certified by a health care professional as requiring long-term care for at least six months and unable

to perform at least two activities of daily living. In addition, caregivers must earn at least $7,500 of earned income to be eligible for the credit. The credit phases out for married taxpayers with incomes over $150,000 ($75,000 for single taxpayers or taxpayers filing separately).

Supporters of Carried Interest Tax Changes Take Their Fight to the States

A coalition of labor unions, community groups, and millionaires is working to change the tax treatment of carried interest on a state-by-state basis. The coalition launched its campaign in March by announcing support for legislation introduced in the New York State Assembly that would treat carried interest of hedge fund and private equity investors as ordinary earned income for tax purposes. As introduced, the bill (A. 9459) would only take effect if the surrounding states of Massachusetts, New Jersey, and Connecticut enact similar laws so that New York residents could not avoid the tax simply by moving to another state.

Members of the coalition include the Patriotic Millionaires and the Hedge Clippers (a group formed to expose the "excesses" of the hedge fund industry). The coalition intends to next take its campaign to California, Connecticut, Illinois, Massachusetts, New Jersey, and Pennsylvania.

» FLOOD INSURANCE

House Committee Approves Flood Insurance Reform Bill

The House Financial Services Committee unanimously approved legislation to encourage private market competition for flood insurance coverage. The bill, H.R. 2901, the Flood Insurance Market Parity and Modernization Act, was introduced by Representatives Dennis Ross (R-FL) and Patrick Murphy (D-FL), and is intended to clarify a provision in the law that has caused mortgage lenders to only accept flood insurance offered through the National Flood Insurance Program. H.R. 2901 clarifies that flood insurance offered by private insurers satisfies the federally mandated flood insurance purchase requirements. The bill's sponsors have indicated the House could vote on the bill sometime this spring. A Senate companion bill (S. 1679) was introduced by Senators Dean Heller (R-NV) and Jon Tester (D-MT) and was referred to the Senate Banking, Housing, and Urban Affairs Committee.

» HOUSING

Influential Democrat Policy Pros Release GSE Reform Proposal

Five policy experts released a proposal to merge Fannie Mae and Freddie Mac into a single government entity, the National Mortgage Reinsurance Corporation (NMRC), which would handle the operations that these two entities currently perform. The NMRC would still guarantee mortgage debt, but it would shift most of the risk to private investors. Under the proposal, the NMRC would purchase conforming single-family and multifamily mortgage loans from originating lenders or aggregators, and issue securities backed by these loans through a single issuing platform that the new entity owned and operated. The NMRC would also guarantee the timely payment of principal and interest and ensure credit access for underserved communities through affordable housing initiatives. A key footnote in the proposal acknowledges that there are a number of issues not addressed that would need to be considered in converting the proposed model into legislation, including "details on how this model would function in the multifamily market…."

The authors of the proposal, which is titled "A More Promising Road to GSE Reform," include Jim Parrott (a former Obama White House housing adviser), Gene Sperling (former director of the National Economic Council for Presidents Obama and Clinton), and Mark Zandi (Moody's Analytics chief economist). Given the resumes of the individuals involved, this proposal is already receiving attention in Washington, although Mr. Sperling has been very clear that the views do not necessarily represent the views of presidential candidate Hillary Clinton.

Congressional Research Services (CRS) Summarizes Federal Rental Housing Programs for Low-Income Seniors and the Disabled

The CRS recently released reports summarizing the ways in which the federal government provides federal housing assistance to low-income seniors and to disabled individuals. In "Section 202 and Other HUD Rental Housing Programs for Low-Income Elderly Residents," the CRS describes the programs operated by HUD that provide assisted housing and supportive services for low-income elderly persons to ensure that elderly residents in HUD-assisted housing can remain in their apartments as they age. The report also discusses current funding issues and notes that financing affordable housing for elderly residents "may require multiple streams of funding to support the design, construction, and ongoing costs of a project." The Low-Income Housing Tax Credit is identified as one of the primary sources available for developing affordable housing.

Senate Special Committee on Aging Holds Hearing on Alzheimer's Disease

On Wednesday, April 6, 2016 the Senate Committee On Aging held a hearing titled: "Finding a Cure: Assessing Progress Toward the Goal of Ending Alzheimer's by 2025." It is estimated that the disease will cost an estimated $236 billion per year including $160 billion to Medicare and Medicaid. These costs are on track to skyrocket as baby boomers age. The committee members examined the human and economic toll of the disease, the accomplishments of researchers, the critical role of caregivers and future steps needed to combat this disease.

Class Action Lawsuit Dismissed (Again)

On March 31, 2016 a federal judge dismissed a class action lawsuit against Vi Senior Living for the second time. The complaint was originally filed in February of 2014 by residents of the Palo Alto senior community accusing the company of illegally transferring refundable entrance fees to its corporate parent. They claim this practice would make it difficult for the company to meet its repayment obligations to the residents. They also allege the company overcharged the residents in the form of higher monthly fees for operating costs. In his first dismissal in November of 2014, the judge ruled the residents could not show injury, i.e. a resident not receiving their entrance fee repayment, which is required to have "standing" to sue. The judge also sided with the company relative to the complaint of overcharging monthly fees, citing the clear language of the contract stipulating that operating costs are included in the monthly fee.

In the March 31, 2016 decision, the judge once again dismissed all of the plaintiffs' original claims, this time without leave to amend {the case}. He stated "plaintiffs once again fail to allege any such harm" to have standing. He also found the residency contract clearly stipulates that monthly fees can be used for operating costs, including taxes. On another matter however, the judge did opine that Vi is required to establish reserve funds under state law but that the Department of Social Services (DSS) has discretion to determine how to apply the reserve requirement. The plaintiffs may pursue further litigation to compel Vi to maintain more reserves than the DSS has previously required.

On a parallel track, legislation is currently pending in the California legislature addressing reserve requirements and entrance fee repayment schedules. AB 2661, an industry supported bill, expands the number of repayment arrangements that will not trigger reserve requirements, and proposes several new disclosures to increase consumer awareness about entrance fee LPC/CCRC's and repayment provisions. This legislation is the alternative proposal to the re-introduced S. 939 (vetoed by Governor in 2015), offered by Senate Majority Leader Monning that significantly reforms the entrance fee repayment schedule, accelerating repayment and imposing compounded interest on unpaid balances. ASHA is working with industry partners in opposition to the Monning legislation.

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