

FEDERAL POLICY UPDATE



**AMERICAN
SENIORS
HOUSING
ASSOCIATION**
Living Longer Better

November 9, 2016

DONALD TRUMP ELECTED 45TH PRESIDENT OF THE UNITED STATES

In what is being described as a stunning upset, Donald Trump has won the race for the Presidency. While it looks like Hillary Clinton won the popular vote, it was Trump who collected 289 of the electoral college votes, exceeding the necessary 270 to win the big prize.

Pundits and pollsters will scratch their heads for days to come, trying to figure out how they got it wrong and prognostications of what a Trump Presidency means will fill the airwaves and boardrooms. Even the Democrats' hopes of taking control of the Senate were dashed by Republicans outperforming the polls. As a result, Trump will assume office in January 2017 with the GOP in control of both chambers of Congress.

On the campaign trail, his signature issues to "make America great again" were immigration reform, trade, repealing the Affordable Care Act (ACA), infrastructure and defeating ISIS. In his election night speech, he promised to focus on economic growth. He will likely take advantage of the "first 100 days" to pursue as much of his policy agenda as he can. He will also have to take care of some housekeeping work such as nominating his cabinet officials, submit a budget to the Congress, and fill approximately 4000 political appointee positions. It is also likely he may consider the suspension of pending regulations of the Obama Administration and work to move forward on a Supreme Court nominee.

ASHA will continue to assess the potential impacts of the election results on the senior housing industry and provide more in-depth analysis about policy priorities of the 115th Congress in the next Federal Update.

NEXT UP: LAME DUCK SESSION WHILE AGENCY ACTIVITY CONTINUES

The 114th Congress will return to Washington for a

lame duck session starting the week of November 14th. Although the November 8th election results will influence the lame duck's agenda, the main priority will be enactment of legislation to keep the government running. Funding legislation will almost certainly be enacted before the current stopgap measure expires on December 9th, thus preventing a government shutdown that neither party wants. The more interesting questions revolve around what other policy issues might ride along on the funding legislation. Congressional staff is currently busy preparing a variety of potential tax, trade, and health initiatives in the hopes that they can be added to what will likely be a massive government funding bill.

As is usually the case with these large year-end bills, the final deals will be made at the last minute behind closed doors. We are hopeful that funding improvements for Alzheimer's research will be part of the final government funding legislation. Beyond that, it seems likely that major controversial changes will not be added to the package this year. However, if history is a guide, there is a good chance that some tax changes will be slipped into the year-end package. Therefore, ASHA is continuing to meet with key members and staff to build support for the inclusion of an extension of the medical expense deduction for seniors in such a bill. In addition, there remains the possibility that a few non-controversial measures might be cleared by the 114th Congress during its last days, such as the 21st Century Cures Act. This legislation is intended to accelerate the discovery, development, and delivery of new medical treatments and cures.

While Congress has been on the campaign trail, the regulators and the courts have been busy. Below is a summary of some of the recent activity.

REGULATORY DEVELOPMENTS

ASHA Comments to CMS Opposing Expansion of Federal Oversight in Fraud Investigations

On November 7, ASHA joined by Argentum, submitted

[comments](#) to CMS in response to a proposed rule that expands the authority for the Medicaid Fraud Control Unit (MFCU) Program. MFCUs investigate and prosecute Medicaid provider fraud as well as patient abuse or neglect in health care facilities and board and care facilities. This rule attempts to codify statutory changes made to the program 17 years ago to expand authority to investigate complaints in non-Medicaid supported programs including private pay assisted living communities. Our letter highlights the following key points: 1) federal inspections of privately funded residential care properties are inappropriate, 2) the legislative intent underlying this expansion is questionable, and 3) state regulation and enforcement of private pay assisted living is effective and appropriate.

We will continue to monitor future action on the regulatory front as well as seek opportunities to address this in Congress.

Challenge to Nursing Home Regulation Prohibiting Pre-Dispute Arbitration Agreements Gets Favorable Ruling ...For Now

As we reported in the last Update, the Centers for Medicare & Medicaid Services (CMS) issued a regulation that includes a provision that will prohibit the use of pre-dispute binding arbitration agreements in long-term care (LTC) facility contracts. This prohibition does not apply to private pay assisted living communities, but it will impact Continuing Care Retirement Communities and Skilled Nursing Facilities that participate in Medicare and/or Medicaid.

On October 17th, the American Health Care Association and other stakeholders filed a [lawsuit](#) in the U.S. District Court for the Northern District of Mississippi to block implementation of the regulation's arbitration provision. The suit challenges the regulation on the grounds that it violates the Federal Arbitration Act (FAA) and exceeds CMS's statutory authority. The suit asks the court to block enforcement of the ban before it takes effect on November 28, 2016.

On November 7, the U.S. District Court for the Northern District of Mississippi granted a preliminary injunction barring HHS enforcement of the rule while the court considers its legality. ASHA will continue to monitor this case as it progresses.

In a development that could have indirect implications for the challenge of the CMS regulation, on October 24th, a Texas District Court issued a nationwide [injunction](#) that temporarily blocks another Obama Administration initiative that, among other things, would restrict the use of certain pre-dispute arbitration agreements by federal contractors. The Texas Court rejected the government's

argument that the FAA does not apply because the federal contractor rules are only applied prospectively. This may be of interest because the prospective application argument was used extensively by the CMS in justifying its nursing home regulation. However, we must caution that the Texas decision interprets a different statute and that the government will certainly appeal.

In another case related to pre-dispute arbitration, the U.S. Supreme Court has agreed to consider a case brought by Kindred Nursing Centers, which challenges a Kentucky Supreme Court decision that found a resident's representative cannot agree to an arbitration clause unless the resident specifically handed over that right to the representative. The [petition for certiorari](#) filed by Kindred asks the Supreme Court to consider whether the FAA pre-empts "a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration." The case could be reviewed and decided before the end of the current term.

What is clear is that these cases are most likely just the start of a long litigation road on the regulatory pre-dispute arbitration limitations that the Administration has proposed in a number of areas.

States and Business Groups File Emergency Motions to Stop DOL Overtime Regulation

As reported in last month's Update, a group of State Attorneys General and a group of businesses filed lawsuits charging that the DOL overtime rule violates the Constitution and is contrary to congressional intent. On October 12th, those same groups filed an emergency motion asking the court to issue a nationwide preliminary injunction to block enforcement of the regulation before it takes effect on December 1, 2016. On October 14th, the business groups filed a motion for expedited summary judgment asking the court to rule on the merits of their case on the same timetable as is set for its hearing of the states' motion for preliminary injunction and to consolidate their case with the states' lawsuit.

Medicare to Cover Alzheimer's Assessment and Care Planning

The Centers for Medicare and Medicaid Services have finalized a decision to reimburse health care providers for cognitive and functional assessment and care planning for patients with Alzheimer's disease and other cognitive impairments. This action effectively implements legislation introduced by Senator Stabenow (D-MI) and Senator Collins (R-ME), S. 857, Health Outcomes, Planning, Education (HOPE) for Alzheimer's Act. According to the Alzheimer's Association, "following a diagnosis, care planning is crucial to improving outcomes and maintaining quality of life, for

the diagnosed and their caregivers, as well as controlling costs and planning appropriately for the future.” Coverage will begin January 2017.

Department of Housing and Urban Development (HUD) Proposes Regulation to Require Greater Level of Flood Protection for HUD-Supported Construction

On October 28th, HUD proposed a [regulation](#) that would require a greater level of flood protection for new construction or substantial rehabilitation projects. The proposal would affect projects receiving HUD assistance, finance, or insurance, and would require that properties deemed “non-critical” be elevated two feet above the site’s base flood elevation. Properties considered “critical,” such as hospitals, nursing homes, convalescent homes, intermediate care facilities, board and care facilities, and retirement service centers would be required to be elevated three feet above the base flood elevation or the 500-year floodplain, whichever is greater. (Independent housing for seniors is not considered “critical.”) More information about the proposed rule is available [here](#), and comments are due by December 27th.

HOUSING REFORM

The Treasury Department Begins Releasing Issue Briefs Outlining Administration’s Goals for Housing Reform

On October 26th, senior Treasury officials posted the first in a series of housing finance reform issue briefs that will analyze the future of Fannie Mae and Freddie Mac. The first [brief](#) focuses on creating a system that would make affordable housing more broadly available and addresses issues such as affordable credit pricing and government initiatives that support affordable rental housing construction and preservation. The officials identify current government programs that support such housing, but note additional funds are needed. The brief specifically addresses multifamily housing financing and notes that such financing supports purchase and refinancing activity for affordable multifamily rental properties and states that the importance of such financing in expanding affordability and access for renters should not be ignored. In addition, the brief states that the GSEs’ multifamily businesses are beneficiaries of taxpayer support and remain critical sources of credit in their own secondary market.

Although these briefs are statements of the departing Obama Administration’s preferences, they likely will receive the attention of some congressional supporters of such reform and the new Administration if Democrats retain the White House. However, despite bipartisan agreement in Congress on the need to reform the GSEs, there is still no agreement in sight on what that reform should look like.

EB-5 PROGRAM EXTENSION

The Chairmen and ranking Democrats of the House and Senate Judiciary Committees have been critical of the EB-5 programs effectiveness in reaching Targeted Employment Areas (TEAs) (rural areas and areas with high unemployment) and have charged that incentives intended for underserved areas are being diverted to urban and affluent neighborhoods. At their request, the Government Accountability Office (GAO) reviewed a sampling of EB-5 petitioner business plans and released a [report](#) on October 19th.

The GAO found (1) that most EB-5 petitioners elected to invest in a TEA, (2) that most petitioners invested in a high unemployment area (as opposed to rural areas), and (3) 41% of petitioners invested in projects located in a census tract where the unemployment rate was between 4% and 6%. Thus, the report seems to provide some ammunition for the Judiciary Committee leaders’ concerns and for their ongoing opposition to extension of the EB-5 program without accompanying reforms.

The current EB-5 program is scheduled to expire after December 9th along with the other provisions enacted in the last stopgap government funding bill. With our coalition partners, ASHA will continue to support extension of the program, which can provide an important source of investment capital.

TAXES

Although no further action is expected this year, congressional interest in tax reform remains strong. In particular, recent media reports on presidential candidate Donald Trump’s tax returns have led to increased attention on the taxation of real estate and we expect that these issues will continue to be debated in 2017.

The House Republicans’ blueprint for tax reform includes a number of major changes that would directly or indirectly affect the taxation of real estate, including:

- A 20% top corporate tax rate; a 33% top individual tax rate (with a special new 25% top rate for certain active income earned by pass-through businesses); and a top rate on investment income (e.g., capital gains, dividends, and interest) of 16½%.
- Repeal of extended tax depreciation of capital assets (including structures, but not land), with immediate expensing of capital investment.
- Elimination of the deductibility of business interest; reform of the net operating loss carryback and carryforward rules; and likely repeal of the like-kind exchange rules.



In response to requests from Ways and Means Chairman Kevin Brady (R-TX), ASHA has been working with others in the real estate community to provide input on the proposed changes and how they collectively could influence current or future real estate investments.

ASHA Members Encouraged to Participate in CDC's National Study of Long-Term Care Providers (NSLTCP)

CDC's National Center for Health Statistics has launched the third wave of the National Study of Long-Term Care Providers (NSLTCP), a biennial national study of the major sectors of paid, regulated providers of long-term care services. NSLTCP collects information about the characteristics of residential care providers, the services they offer, and their staffing; and the demographics, functional status and health of the residents they serve. This information will help policymakers, health care planners, and providers better understand, plan for, and serve the future long-term care needs of the older population and disabled adults. Participation is voluntary. If your residential care community is contacted, make your voice heard by participating in the study. NCHS has contracted with RTI International, an independent, nonprofit research organization, to collect 2016 NSLTCP data. If you have questions about completing the questionnaire, please contact the NSLTCP Help Desk today at 1-866-245-8078. For more information please visit the NSLTCP website: http://www.cdc.gov/nchs/nsltcp/nsltcp_questionnaires.htm

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