

FEDERAL POLICY UPDATE



AMERICAN SENIORS HOUSING ASSOCIATION
Living Longer Better

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» **CONGRESS AVOIDS GOVERNMENT SHUT-DOWN AND HEADS HOME TO CAMPAIGN WHILE FEDERAL AGENCIES CONTINUE TO PURSUE ACTIVE AGENDA**

With the end of the fiscal year looming, and a few false starts, the Senate passed a stopgap funding measure on September 28th to keep the federal government running through December 9th. The House quickly followed suit, and Congress made its exit from Washington, D.C. to get home and campaign. Members will not return until after the November elections.

When Members return, they will have to fund the government's operations through one of three options: (1) a temporary continuing resolution that funds the government at, or close to, the previous fiscal year's level; (2) an "omnibus" bill that packages all (or most) of the appropriations bills for the rest of the fiscal year; or (3) a series of specific spending bills, often referred to as "minibuses" (the approach preferred by the Republican Leaders). The election outcome will likely determine the scope of the lame duck agenda, but there does seem to be a significant opportunity for the larger year-end spending bill or bills to carry along a range of extraneous items, including some relatively noncontroversial tax provisions. As discussed below, ASHA is continuing to meet with key members and staff to advocate for the extension of the medical expense deduction for seniors, which could be included in such a bill. A summary of other recent legislative and regulatory activity is provided below.

» **REGULATORY DEVELOPMENTS**

CMS Releases Final Rule Prohibiting Use of Binding Arbitration Agreements by Long-Term Care Facilities that Participate in Medicare and Medicaid Programs

On October 4th, the Centers for Medicare & Medicaid Services (CMS) published [final regulations](#) to revise the requirements that long-term care (LTC) facilities must meet in order to participate in the Medicare and Medicaid programs. A

press release describing the regulations is available [here](#).

Perhaps the most controversial provision is a prohibition on the use of pre-dispute binding arbitration agreements in LTC facility contracts. This prohibition does not apply to private pay assisted living communities but it will impact CCRCs' Skilled Nursing Facilities (SNFs) that participate in Medicare and/or Medicaid. The Medicaid Home and Community Based Services (HCBS) Waiver program also appears to fall outside the reach of this rule. However ASHA will continue to assess specific impact of this rule on the industry.

Facilities and residents impacted will, however, still be able to use arbitration on a voluntary basis after a dispute arises, but only if it is not as a condition of remaining on the premises. Other issues addressed in the final rule include staff training and the development of quality assurance and performance improvement programs.

The provisions of the final rule will be implemented in three phases, with the ban on mandatory arbitration included in the first phase of implementation effective with respect to arbitration agreements signed on or after November 28, 2016. The regulation also makes clear that it does not affect already existing arbitration clauses, but it prohibits Medicare- and Medicaid-participating LTC facilities from using them in the future as a condition of participating in these programs.

ASHA submitted comments on the proposed regulations challenging CMS's authority to oppose such restrictions and expressing our firm objections to any such prohibition. We are disappointed that the final rule ignores the benefits that arbitration agreements can provide to residents and LTC facilities. Moreover, as we have previously reported, the CMS action is the latest chapter in a sweeping regulatory effort to restrict the use of binding arbitration in a range of settings, including, for example, restrictions affecting consumer finance, education, and fiduciary obligations. Particularly troublesome is a statement in the preamble to the CMS regulations responding to a comment that there was no jus-

tification for limiting arbitration agreements in LTC facilities. The CMS response was that its concerns about pre-dispute binding arbitration are applicable to any health care provider, but that it decided to make LTC facilities its “first priority.”

For these and other reasons, we anticipate that ASHA will, as appropriate, continue to support efforts to challenge CMS’s authority to issue a binding arbitration ban.

CMS Proposes to Expand Medicaid Enforcement Authority to Private Pay Operators

The Department of Health and Human Services Office of Inspector General in conjunction with CMS published a proposed rule that would update the Medicaid fraud program. Among other things, the proposal grants Medicaid Fraud Control Units (MFCUs) the authority to investigate complaints of fraud and abuse in board and care facilities regardless of the source of payment. They also define board and care to include assisted living properties. ASHA is currently reviewing the rule, and drafting comments to send to CMS objecting to this unnecessary and inappropriate expansion of Medicaid authority to the private pay market. A copy of the proposal can be found [here](#). Comments are due Nov 21, 2016.

Congressional Action on Postponing Effective Date of DOL Overtime Rule

As we have reported, the Department of Labor (DOL) released a controversial overtime rule that would increase to \$47,476 the salary threshold under which workers qualify for overtime pay, effective December 1st. Prior to adjourning for the election, the House passed H.R. 6094, the Regulatory Relief for Small Businesses, Schools, and Nonprofits Act, to delay implementation of the rule until June 1, 2017. An identical bill (S. 3462) was introduced in the Senate. While there is strong support among congressional Republicans to block or delay implementation of the overtime rule, the White House has already said President Obama would veto such legislation and it is unlikely that the rule’s opponents would have enough votes to overturn his veto.

State Attorneys General and Business Groups Challenge DOL Overtime Rule

A group of State Attorneys General filed a lawsuit in the U.S. District Court for the Eastern District of Texas on September 20, 2016, charging that the DOL overtime rule violates the U.S. Constitution and exceeds congressional authority. A group of businesses led by the U.S. Chamber of Commerce made similar allegations in a suit filed in the same court. That complaint also addresses the indexing mechanism and argues that the DOL exceeded its authority by disregarding Congress’s mandate to exempt executive, administrative,

professional, and computer employees from the overtime requirements of the FLSA.

» EB-5 IMMIGRANT INVESTOR VISA PROGRAM

EB-5 Program Extension Included in Stopgap Funding Bill

The short-term government funding bill passed by Congress on September 28th includes an extension of the current EB-5 Regional Center Program that was scheduled to expire at the end of September. Like the other provisions of the bill, the extension will expire after December 9th and Congress will again need to consider funding legislation when it returns after the election. ASHA will continue working with our coalition partners, as appropriate, to obtain a long-term solution.

Judiciary Committee Leaders Continue to Push for EB-5 Program Reforms

The Chairmen and Ranking Members of the House and Senate Judiciary Committees have been considering a variety of reforms to the EB-5 Program to address what they consider fraud and abuse plaguing the program. Among other things, the bills increase the minimum investment amount for both targeted and non-targeted employment areas and include investor fraud protections and regional center oversight provisions. All four members have opposed extension of the EB-5 Program without accompanying reforms and we expect them to push to include some of these reforms as part of the funding bill Congress will need to consider at the end of this year.

» FEDERAL TAX POLICIES

Medical Tax Deduction Bill Passes House

On September 23rd, the House passed H.R. 3590, the Halt Tax Increases on the Middle Class and Seniors Act. As we have reported, the bill, introduced by Representative Martha McSally (R-AZ), would permanently reduce the income threshold for purposes of the medical expense deduction for all taxpayers. The Senate is not expected to act on H.R. 3590 before Congress adjourns, and the President has already indicated he would veto the bill in its current form because of its revenue costs.

ASHA supports H.R. 3590, but we are also continuing to focus our efforts on the bill introduced by Senators Rob Portman (R-OH) and Sherrod Brown (D-OH) that is specifically targeted to seniors. S. 3111, the Seniors Tax Hike Prevention Act, would delay for two years (2017 and 2018) the scheduled increase in the threshold for the deduction of medical expenses from 7.5% of income to 10%. As men-



tioned above, it is still possible that a package of relatively modest bipartisan tax proposals could be considered this year. Because of the importance of the medical expense deduction to seniors housing residents, ASHA will continue to meet with Members of Congress and their staffs to build support for keeping the 7.5% deduction in place for seniors.

Senate Finance Committee Ranking Democrat Proposes Middle-Income Housing Tax Credit

On September 22nd, Senate Finance Committee Ranking Member Ron Wyden (D-OR) introduced legislation that is intended to encourage the development of affordable rental housing for middle-income households. S. 3384, the Middle-Income Housing Tax Credit Act, is modeled on the existing Low-Income Housing Tax Credit (LIHTC) and designed to work in conjunction with the LIHTC. Under the bill, the federal government would allocate the middle-income housing tax credits to states based on their populations, and state housing authorities would then allocate the tax credits to developers through a competitive process. A one-page summary of the bill can be found [here](#) and a longer summary can be found [here](#). ASHA is in the process of reviewing the legislation and will provide input to the Senator and his staff as appropriate.

Senate Republicans Urge Treasury Department to Withdraw Proposed Estate Valuation Discount Regulations; Companion Bills Introduced in House and Senate to Block Regulations

As we reported last month, ASHA is monitoring regulations proposed by the IRS that are designed to restrict the application of valuation discounts to interests in closely held

businesses or other entities for purposes of estate, gift, and generation-skipping transfer taxes. An IRS hearing on the proposed regulations is scheduled for December 1st.

Forty-one Senate Republicans, including Finance Committee Chairman Orrin Hatch (R-UT), recently sent a letter to Treasury Secretary Jack Lew expressing concern about the increased estate tax burden that the proposed regulations would impose on family businesses and requesting its withdrawal. In addition, identical bills to prohibit the use of federal funds to finalize, implement, administer, or enforce the regulations were introduced in the House and Senate (H.R. 6100 and S. 3436).

Presidential Candidate Clinton Proposes Limits on Section 1031 Like-Kind Exchanges

A new limit on the amount of capital gain that can be deferred in a section 1031 like-kind exchange was among the tax increases recently proposed by Hillary Clinton to pay for a series of new tax breaks. The [Fact Sheet](#) announcing the new proposals states, "she would limit the tax benefits of 'like-kind exchanges,' which prevents capital gains taxation on certain sales." According to a report from the Committee for a Responsible Budget, Mrs. Clinton's proposal is similar to President Obama's proposal which would limit the gains deferred to \$1 million per year. As we reported last month, ASHA is a member of the Real Estate Like-Kind Exchange Coalition, and we joined with our colleagues to send a letter emphasizing the importance of the like-kind exchange rules to real estate. An identical letter was sent to Presidential candidate Trump.

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