CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE

FROM: Lee Wilcox

SUBJECT: **FEDERAL LEGISLATIVE AND REGULATORY UPDATE**

DATE: November 7, 2018

Approved D. D Syl Date 11/8/18

RECOMMENDATION

Accept the report from the City's federal legislative advocacy firm of Squire Patton Boggs, LLP.

BACKGROUND

The City's federal legislative and regulatory advocacy in 2018 focused on several high-priority policies. Highlights include:

Immigration

Flores Settlement: The Flores Settlement Agreement sets rules around the conditions and length of time immigrant children are detained. The Department of Homeland Security and the Department of Health and Human Services proposed a rule earlier this year to amend the Flores settlement. The new proposal does not set limits on the amount of time children could be held in detention. Rather, it seeks the authority to hold migrant children and their parents until their cases have been adjudicated, essentially eliminating the maximum detention time for immigrant children to 20 days. The proposed rule also eliminates key procedural protections for children in the Departments' custody. On November 6, 2018, the City joined 19 other cities and counties across the United States on a Flores comment letter. In addition, the City will be joining the amicus brief in support of the Flores plaintiffs' motion to enforce the settlement agreement.

Public Charge: The Department of Homeland Security is proposing to expand the "public charge" rule to add programs like Medicaid, food stamps, and Federal public housing. A person who is deemed a public charge would not be eligible to become a legal permanent resident. The City is preparing a comment opposing the change, organizing an ethnic media roundtable to present facts about the Public Charge proposal, and reaching out to San José's Federal representatives on a potential delegation letter opposing the change.

Broadband

The Federal Communications Commission (FCC) adopted a 5G Broadband Deployment Declaratory Ruling that reduces local government authority by intending to limit lease rates and permit processing authority. The City of San José is one of several jurisdictions that is challenging the FCC ruling. The City is also closely monitoring the STREAMLINE Small Cell Deployment Act in the Senate. The City met with key leaders of the Senate Commerce Committee including Chairman Thune and Senator Schatz, the ranking member of the Communications, Technology, Innovation and Internet Subcommittee, to express concerns with the bill. The City is also working closely with a broad coalition of national stakeholders, such as the National League of Cities, on advocacy.

Private Activity Bonds

The City is working with Congresswoman Eshoo on legislation to add community-serving facilities to the list of exempt facilities for Private Activity Bonds.

Autonomous Vehicles

The City worked closely with Senator Feinstein, other California cities, and New York City on technical amendments to the AV START Act to ensure that local governments can continue to enforce local traffic laws and provide safe and accessible transportation options. Senator Feinstein headed a Senate coalition who raised concerns with the AV START Act, and is leading efforts to negotiate amendments to preserve local ordinances. The measure is currently pending before the full Senate.

Airport

This year, the President signed a 5-year Reauthorization bill for the Federal Aviation Administration and the Transportation Security Administration. The bill keeps the federal cap on the Passenger Facility Charge at $4.50 per passenger per segment, and kept $3.35 billion per year for the Airport Improvement Program; neither the fee nor the program incorporated any adjustments for inflation. It also authorizes $55 million annually for the Law Enforcement Officer Reimbursement Program, from which the Norman Y. Mineta San Jose International Airport receives nearly half a million dollars. The City worked with our Federal legislative delegation and national associations on the Reauthorization bill to push for increases in funding for both the Passenger Facility Charge and the Airport Improvement Program.

More details are in Squire Patton Boggs, LLP's reports attached to this memo.

COORDINATION

The Administration coordinated this memo with the City's federal legislative advocacy firm, Squire Patton Boggs, LLP, the Office of Immigrant Affairs, the Office of Civic Innovation, and the Departments of Transportation and Finance.

/s/
Lee Wilcox
Chief of Staff

For questions, please contact Bena Chang, Director of Intergovernmental Relations, at (408) 975-3240.

Attachments

SQUIRE PATTON BOGGS

From: Squire Patton Boggs LLP
Date: November 5, 2018
Subject: Federal Legislative and Regulatory Action Relevant to General Local Government Interests: Fall Supplemental 2018

INTRODUCTION

This report provides an update to our federal legislative and regulatory report produced on September 5. While Congress has been in recess since the beginning of October (the House since September 28, and the Senate since October 11), several key pieces of must-pass legislation were enacted prior to Members heading home to campaign, including: the Federal Aviation Administration reauthorization; the Water Resources Development Act (WRDA); and a comprehensive package to address the opioid crisis.

Both Chambers will return to work on November 13. The biggest legislative action facing Congress after the midterm election is completing the remainder of the FY 2019 budget. Five FY 2019 spending bills were enacted prior to the start of the FY 2019 fiscal year on October 1; the remainder of the federal government is operating under a Continuing Resolution (CR) through December 7.

Additional unfinished business awaiting action in the lame duck: Coast Guard reauthorization; the 2018 Farm Bill; reauthorization of the National Flood Insurance Program (NFIP); reauthorization of the Land and Water Conservation Fund (LWCF); and tax extenders.

BUDGET/APPROPRIATIONS

FY 2019 Appropriations

Congressional action in the lame-duck session will focus on efforts to complete the FY 2019 appropriations process. Five of the FY 2019 bills, representing approximately 75 percent of total discretionary spending, were enacted prior to the start of FY 2019 on October 1:

- Energy & Water
- Military Construction/Veterans Affairs
- Legislative Branch
- Defense
- Labor-Education-Health and Human Services

The remaining agencies are operating under a Continuing Resolution (CR) through December 7:

- Interior and Environment
- Financial Services

- Transportation-Housing
- Agriculture
- State/Foreign Operations
- Commerce-Justice-Science
- Homeland Security

The most challenging obstacle to the remainder of the FY 2019 appropriations process is the President's veto threat over funding for a border wall between the United States and Mexico. The House bill provides the President's request of $5 billion for the wall, whereas the Senate version provides only $1.6 billion. Controversial policy riders in the House versions of the remaining bills will also complicate negotiations, as will immigration policies surrounding the separation of migrant families, the caravan of asylum-seekers reportedly heading to the U.S. border, and President Trump's anticipated Executive Order regarding birthright citizenship.

OPIOIDS

On October 24, President Trump signed the *Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act* (H.R. 6) into law. The sweeping package incorporates prevention, treatment, research, recovery, and law enforcement initiatives.

OPPORTUNITY ZONES

The Tax Cuts and Jobs Act of 2017 (P.L. 115-97) established a new economic development program in which "Opportunity Zones" are designated to encourage long-term private investments in low-income communities by providing a federal tax incentive to promote capital investments in these areas nationwide. The Opportunity Zones program provides a tax incentive for investors to reinvest their unrealized capital gains into "Opportunity Funds" that are dedicated to investing into Opportunity Zones.

On October 19, the Treasury Department issued proposed guidance related to the new Opportunity Zone tax incentive. The guidance is intended, in part, to clarify what gains qualify for deferral, which taxpayers and investments are eligible, and the parameters for Opportunity Funds. Interested parties may submit comments on the guidance through December 28, 2018. A public hearing is scheduled for January 10, 2019.

IMMIGRATION/HOMELAND SECURITY/PUBLIC SAFETY

BORDER WALL

As noted above, funding for the border wall will be a significant point of contention between the President and Congress as they work to finalize the FY 2019 budget. Additionally, in recent days/weeks, Republicans introduced several stand-alone bills to address the border wall. House Majority Leader Kevin McCarthy (R-CA) introduced legislation to provide full funding of $23.4 billion for the border wall and Senate Armed Services Committee Chairman Jim Inhofe (R-OK) will reportedly introduce a bill to provide $25 billion for the border wall by, in part, imposing fines on illegal border crossings.

MIGRANT FAMILY SEPARATION / FLORES SETTLEMENT

In September, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) proposed amending the regulations that relate to the apprehension, processing, care, custody, and release of juvenile undocumented immigrants as a result of the Flores Settlement Agreement (FSA), a 1997 settlement agreement in the 1985 class-action lawsuit *Flores v. Reno*.

While this new rule would codify a number of FSA's components, it would also amend some, such as the maximum time of detention, which is currently set at 20 days. DHS and HHS acknowledge that implementation of the proposed rule may result in extending detention of some minors and their accompanying parent or legal guardian in Family Residential Centers beyond 20 days. Comments on the proposed rule are due November 6.

PUBLIC CHARGE

In September, the Department of Homeland Security (DHS) announced a proposed expansion to the "public charge" rule. The new rule proposes to redefine the immigration law regarding immigrants deemed to be a "public charge," those likely to be dependent on public benefits. Comments on the proposed rule are due December 10.

At present, only cash-assistance programs, such as Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI), as well as potential institutionalization for long-term care at government expense, are considered to make this determination. Under the Administration's new definition, additional benefits would be considered, including: Medicaid (with limited exceptions for Medicaid benefits paid for an "emergency medical condition," and for certain disability services related to education); Medicare Part D Low Income Subsidy; the Supplemental Nutrition Assistance Program (SNAP, or food stamps); Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and Public Housing.

MIGRANT CARAVAN

Leading into the midterm election, President Trump has been focused on "closing the borders" to the reported caravan of asylum seekers en route on foot to the U.S.-Mexico border. Last week, President Trump dispatched the U.S. military to several locations along the border to assist U.S. Customs and Border Protection (CBP) officials in limiting the admission of these migrants.

On November 1, President Trump stated that he would be issuing an executive order, which would automatically reject asylum requests for those who do not enter the United States via an official port of entry. President Trump's order would also reportedly establish "large cities of tents" for migrants to wait for their requests to be processed.

BROADBAND

5G BROADBAND DEPLOYMENT – SMALL CELL SITING AND LOCAL AUTHORITY

The Federal Communications Commission (FCC) adopted its rule, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* which affects 5G Broadband Deployment

at the local level nationwide. The measure would effectively use FCC regulations to overrule state and local regulations with a one-size-fits-all approach, limiting the time local governments have to review 5G applications from providers, as well as the fee amounts they are allowed to charge these providers as they deploy hundreds of small-cell components throughout the nation's cities and towns.

A number of cities have since challenged the rule and filed petitions with U.S. Courts of Appeal.

CABLE RATE REGULATIONS

In October, the FCC adopted a Further Notice of Proposed Rulemaking and Report and Order to modernize its cable television rate regulations and update or eliminate outdated rules. The notice has not yet been published in the Federal Register; publication will trigger a 30-day comment period.

TRADE

On September 30, Canada agreed to join the trade deal announced by the United States and Mexico on August 27, preserving the trilateral format of the original North American Free Trade Agreement. The modernized U.S.-Mexico-Canada Agreement (USMCA) will be signed by leaders of all three countries on November 30 and considered by Congress in 2019.

SQUIRE
PATTON BOGGS

From: Squire Patton Boggs LLP
Date: September 5, 2018
Subject: Federal Legislative and Regulatory Action Relevant to General Local Government Interests: Summer 2018

This report provides a comprehensive update for local governments and their partners highlighting actions on notable federal legislation, administration, and regulatory issues since our last such update in April. It is important to note that the memorandum provides only a high-level perspective; detailed reports were provided as events unfolded in Congress and the Administration.

During late spring and summer, Congress made great process on passing appropriations legislation for FY 2019. Both chambers passed all 12 of their spending bills out of committee. The House passed six of its appropriations bills for the upcoming fiscal year, while the Senate passed nine spending bills thus far.

There are several items on Congress' "must pass" list prior to the midterm elections, including: the FY 2019 budget; the Farm Bill; the Federal Aviation Administration (FAA) reauthorization; and the Land and Water Conservation Fund. All are set to expire on September 30. Also set to expire on November 30 is the National Flood Insurance Program's (NFIP) authorization. Other items that may see action before the midterms:

- *Confirmation of Judge Brett M. Kavanaugh to the Supreme Court*: The Senate Judiciary Committee has begun Judge Kavanaugh's confirmation hearnig. With Republicans holding a slim 51-49 majority in the chamber, confirming Judge Kavanaugh may prove to be a daunting task. Republican Senators Lisa Murkowski (AK) and Susan Collins (ME) have expressed some concern over his nomination and about any potential action to overturn *Roe v. Wade*; however, three Democrats running for re-election in states President Trump carried in 2016, Senators Heidi Heitkamp (ND), Joe Donnelly (IN), and Joe Manchin (WV), may vote in support of Judge *Kavanaugh*, as they did for Justice Neil Gorsuch.

- *Opioid Legislation*: Earlier this summer, the House approved an extensive package that included over 50 bills addressing opioids (H.R. 6). Leaders of the Senate Health, Education, Labor, and Pensions Committee hope to have an opioid bill ready to bring to the Senate floor before the midterm elections. Once the Senate introduces and passes opioid-related legislation, the two chambers will need to conference their bills in order to enact a final package.

- *Water Resources and Development Act (WRDA)*: Over the summer, the House passed its version of WRDA (H.R. 8), while the Senate version of the bill (S. 2800) was reported out of the Senate Committee on Environment and Public Works. While the Senate has yet to pass its version of the legislation, we understand that House and Senate staff are already in discussions on a final bill.

- *Drug Pricing*: The Senate recently endorsed a blueprint by President Trump that proposes requiring pricing information in drug advertisements and giving pharmacists the right to tell customers when a lower-cost drug option is available. Legislation focused on these policies could have a strong chance of passing both chambers. One bipartisan bill (S. 974) with support in both chambers may also be taken up later this fall. The bill is meant to deter branded drug makers from denying sales of their drugs to potential generic competitors who need samples to develop the cheaper copied version.

- *Trade*: Sixty days prior to the signing of a trade agreement with Mexico (expected in November), the Administration must publicly post the text of the agreement and submit a list of any changes to U.S. law, which would be near the end of September. It also remains unclear whether the current Congress would entertain consideration of the bilateral deal, prior to its adjournment. The general consensus is the House and Senate parliamentarians are the ones who will ultimately decide whether Trade Promotion Authority applies to the bilateral U.S.-Mexico (currently sans Canada) Trade Agreement.

Other items that will certainly be a part of the political messaging leading into the midterm elections, but likely will not see any action until the lame duck include tax extenders, immigration, pensions, and election security.

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PRESIDENTIAL EXECUTIVE ORDERS

Since our update in April, President Trump signed 19 executive orders:

- Reimposing Certain Sanctions with Respect to Iran;
- Establishing the President's National Council for the American Worker;
- Establishment of the Task Force on Market Integrity and Consumer Fraud;
- Excepting Administrative Law Judges From the Competitive Service;
- Establishing an Exception to Competitive Examining Rules for Appointment to Certain Positions in the United States Marshals Service, Department of Justice;
- Affording Congress an Opportunity to Address Family Separation;
- Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States;
- Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles;
- Exemption from Executive Order 13658 for Recreational Services on Federal Lands;
- Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use;
- Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining;
- Prohibiting Certain Additional Transactions with Respect to Venezuela;
- Efficient Federal Operations;
- Enhancing the Effectiveness of Agency Chief Information Officers;
- Enhancing Noncompetitive Civil Service Appointments of Military Spouses;
- Establishment of a White House Faith and Opportunity Initiative;
- Delegation of Authority to Approve Certain Military Decorations;
- Task Force on the United States Postal System; and
- Reducing Poverty in America by Promoting Opportunity and Economic Mobility.

BUDGET/APPROPRIATIONS

FY 2019 APPROPRIATIONS

The House and Senate continued to pass appropriations bills for FY 2019 at a pace unseen in years, if not decades, as members have until September 30 to pass a spending package for the upcoming fiscal year to avoid a government shutdown.

Thus far, both chambers have passed all 12 of their spending bills out of committee. By taking bills to the floor in minibus packages comprised of two-three bills, the House passed six of its 12 spending bills for FY 2019 before adjourning for the August recess: Energy and Water; Military Construction-VA; Legislative Branch; Interior and Environment; Financial Services; and Defense.

The Senate, also utilizing the minibus approach, made good use of its cancelled August recess by passing six bills last month: Agriculture; Defense; Financial Services; Interior and Environment; Labor-HHS-Education; and Transportation-Housing. The Senate also approved three bills in June: Energy and Water; Military Construction-VA; and Legislative Branch.

With only four weeks and less than 15 legislative days before the September 30 deadline, House and Senate appropriators may bring their first conferenced bill to the chamber floors this week – the Energy and Water, Legislative Branch, and Military Construction-VA bill (H.R. 5895).

However, conferencing the FY 2019 spending bills will not be easy. The House approved most of its appropriations bills on a partisan basis, while the Senate kept contentious policy riders out of the spending bills in order to pass them with bipartisan support. Differing funding levels will also present challenges, as the bills must be reconciled to adhere to the two-year budget agreement enacted earlier this year, which limits discretionary spending caps at $647 billion for defense programs and $597 billion for nondefense, or domestic, programs for FY 2019.

Even the typically non-contentious Military Construction-VA bill will present a challenge over $1 billion in increased funding for a private health care program for veterans. Earlier this year, President Trump signed the *VA MISSION Act* (Pub. Law 115-182) into law, which changed this program from being mandatory to discretionary funding. As a result, the increased funding would be subject to the spending caps and require offsets from other programs. However, some members want the additional money declared as emergency funding so that it would not count against the spending caps.

One of the biggest barriers to passing a spending package on time is the dispute surrounding funding President Trump's border wall. The House's FY 2019 Homeland Security Appropriations bill includes $5 billion for approximately 200 miles of physical barriers and related technology along the southern border, while the Senate's bill includes only $1.6 billion. Democrats from both chambers immediately expressed opposition to the House funding and the President threatened a government shutdown if Congress did not provide his requested level of funding by September 30. In recent days, the President has backed down a bit, indicating he may agree to wait until after the midterm elections.

Unless the President amps up his shutdown threat in the coming weeks, we anticipate that some FY 2019 spending bills will be enacted by September 30, but most will likely be included in a Continuing Resolution (CR) that will last at least until after the midterm elections.

BUDGET PROCESS REFORM

In addition to establishing discretionary spending caps for FY 2018 and FY 2019, the *Bipartisan Budget Act of 2018* (P.L. 115-123) directed the creation of a 16-member, bipartisan, bicameral committee to develop a plan to reform the annual budget and appropriations process. The committee held a public hearing this summer and Members continue to meet in order to make recommendations by the November 30 deadline

IMMIGRATION/HOMELAND SECURITY/PUBLIC SAFETY

DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

After several failed attempts earlier this year to pass legislation in the Senate codifying Deferred Action for Childhood Arrivals (DACA) protections for eligible DREAMers under federal law, the House considered, but failed to pass, several measures on immigration enforcement, which included DACA provisions.

In early May, House Republican moderates filed a discharge petition in an attempt to force a vote in the House on a resolution (H.Res.774) designed to serve as a vehicle to consider several immigration bills. In

order to bypass leadership to bring the bills up for a floor vote, a discharge petition requires 218 signatures. When it became apparent the petition would garner sufficient Republican support to succeed, Speaker Paul Ryan (R-WI) convinced his caucus to hold off on the discharge petition in exchange for a vote on two Republican legislative proposals: the *Securing America's Future Act* H.R. 4760); and the *Border Security and Immigration Reform Act of 2018* (H.R. 6136), a GOP compromise proposal developed by Speaker Ryan.

The House rejected the *Securing America's Future Act* by a 231-193 vote, and the *Border Security and Immigration Reform Act of 2018*, by a 301-121 vote. The rejection of both bills left the path forward for Congressional efforts to codify DACA legislation unclear.

In addition to the action in Congress, U.S. District Judge John Bates of the District of Columbia issued the third U.S. District Court ruling against the Trump Administration's decision to terminate the DACA program. The order served as the most significant DACA-related decision to date, as Judge Bates ordered the Department of Homeland Security (DHS) to accept both renewals and new applications under the DACA program. Siding with previous decisions issued by federal judges in California and New York, Judge Bates argued that DHS' decision to rescind the DACA program was "arbitrary and capricious" and that DHS had not provided adequate justification explaining why the program is unlawful. It is worth noting that more recently, Judge Bates ruled that while the Administration is required to continue to process DACA renewal applications that had been received, they are not obligated to respond to new applications at this time.

BORDER WALL

In January, the Administration requested $18 billion for the border wall. As the House and Senate Appropriations Committees began work on their FY 2019 spending bills, the President said he was going to request additional FY 2019 funding and threatened to veto any spending bill that did not include sufficient funding for the border wall.

In response, the House increased funding in its draft FY 2019 Department of Homeland Security (DHS) appropriations bill to provide approximately $5 billion in federal funding for the construction of a physical barrier along the U.S. southern border. The pending Senate bill provides only $1.6 billion.

In August, the Government Accountability Office (GAO) released its public performance audit on the border wall. The report examined: (1) how U.S. Customs and Border Protection (CBP) evaluated potential designs for barriers; (2) DHS's process for identifying and assessing locations for future deployments of barriers, and (3) how DHS is managing the acquisition of the Border Wall System Program, among other things. The report was especially critical of DHS and CBP cost estimates of the wall and recommended the agency further analyze the costs associated with future barrier segments and include that analysis in future planning, and document plans for the planned secondary barrier replacement in the San Diego sector.

SEPARATION OF MIGRANT CHILDREN AND FAMILIES

In April, Attorney General Jeff Sessions announced a new "zero-tolerance policy" with regard to border crossings. Under this initiative, all individuals apprehended at the border by U.S. Customs and Border Protection (CBP) are immediately transferred to adult detention facilities and referred for criminal prosecution. As a result, thousands of children and adults detained by DHS/CBP were separated from

their families and transferred, sometimes across state lines, to facilities managed by the Department of Health and Human Services (HHS).

After immense congressional and public backlash, President Trump halted the separation of migrant families in June, issuing an order to detain families together. Shortly thereafter, in response to a lawsuit brought by the American Civil Liberties Union (ACLU), U.S. District Judge Dana Sabraw ordered the Administration to reunite children under age five with their families by July 12 and older children by July 26. While over 2,000 children have since been reunited with their families, as of August 23, it is reported that 528 remain separated. In some of these cases, the parents have already left the U.S., either through deportation or voluntary removal, and cannot be located.

Over two dozen legislative measures have been introduced in the House and Senate addressing migrant family separation. For example, Senate Democrats, including Senate Majority Leader Chuck Schumer (D-NY) and Senator Dianne Feinstein (D-CA), introduced the *Keep Families Together Act* (S. 3036). The bill would require the Secretary of Homeland Security to issue guidance and training programs for CBP barring the separation of undocumented children and parents. Representative Jerrold Nadler (D-NY) introduced a companion bill in the House (H.R. 6135).

Republicans also introduced legislation. Senator Thom Tillis (R-NC) and Representative Daniel Webster (R-FL) introduced the *Keep Families Together and Enforce the Law Act* (S. 3093/H.R. 6190). While this bill would also require children to remain with their parents during legal proceedings, it would eliminate the detention limit, currently 20 days, established by a settlement in the case of Flores v. Reno. Senator Ted Cruz (R-TX) introduced the *Protect Kids and Parents Act* (S. 3091) to limit the separation of families and expedite the asylum process for individuals with children.

Following the July 26 deadline, Judge Sabraw required the Administration to provide the ACLU with a list of deported parents and families identified as ineligible for reunification. The Judge continues to hold status conferences with the Administration and the ACLU. As these efforts continue, it is unlikely we will see action on any of the legislative proposals.

SANCTUARY CITIES

On June 6, the U.S. District Court for the Eastern District of Pennsylvania issued a judicial order ruling in favor of the City of Philadelphia against the Department of Justice regarding sanctuary policy. Philadelphia filed litigation against the Department of Justice (DOJ) in response to the agency imposing immigration-related conditions on the receipt of Byrne JAG funding. The City also requested a declaration that it was in lawful compliance with 8 U.S.C. 1373 (Section 1373).

To receive Byrne JAG funding, DOJ required applicants to:

- Certify compliance with Sec. 1373;
- Permit DHS personnel to access any detention facility to meet with an undocumented immigrant and make inquiry into that individual's removability; and
- Provide at least 48-hour advance notice to DHS regarding the scheduled release date and time of an undocumented immigrant in a jurisdiction's custody when requested by DHS.

The Court ruled that: (1) the President's claims that immigrants commit more crimes than native-born citizens do not justify the imposition of these conditions; (2) the Attorney General did not follow

established law in promulgating the latter two conditions; and (3) that the Attorney General did not follow established law in promulgating the first condition regarding Sec. 1373 compliance, and that the Supreme Court's recent opinion in Murphy v. NCAA renders it unconstitutional.

The Court ruled that the City has proven it will suffer irreparable harm if the conditions are not enjoined, and that the City is entitled to the prompt payment of Byrne JAG funding.

Additionally, on August 29, the Seventh Court of Appeals ruled that U.S. Conference of Mayors members do not have to adhere to "unconstitutional and illegal" conditions imposed on Byrne JAG public safety grants by the Attorney General. This ruling came as a result of a suit pursued by the U.S. Conference of Mayors and came right before the original August 31 deadline to accept Byrne Grant Awards.

Following this ruling, DOJ extended the deadline for filing all of the paperwork to accept Byrne JAG awards from August 31 to September 7.

MARIJUANA

Earlier this year, the Department of Justice (DOJ) announced it was lifting an Obama-era policy that prevented federal authorities from enforcing federal marijuana policy in states where the drug is legal. In a memorandum proclaiming this decision, Attorney General Jeff Sessions gave authority to federal prosecutors to decide whether to enforce federal laws despite state policy when contemplating prosecutions related to marijuana activities.

In response, Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA) introduced the *Strengthening the Tenth Amendment Through Entrusting States (STATES) Act* (S. 3032), which would give states the right to determine the best approach to marijuana within their borders. The bill would not federally legalize marijuana, but instead would amend the Controlled Substances Act (CSA) with language protecting states who choose to legalize it. The bill also states that compliant marijuana transactions are not considered trafficking and allows legal cannabis businesses to have bank accounts at national banks. It would also remove industrial hemp from the list of substances prohibited under the CSA. The bill was last referred to the Senate Committee on the Judiciary. Representative David Joyce (R-OH) introduced a similar bill in the House (H.R. 6043).

In June, the Food and Drug Administration (FDA) approved Epidiolex, a cannabidiol (CBD) oral solution for the treatment of seizures associated with forms of epilepsy. This is the first FDA-approved drug that contains a purified drug substance derived from marijuana. CBD is a chemical component of marijuana; however, CBD does not cause intoxication or euphoria that comes from tetrahydrocannabinol (THC).

TRANSPORTATION/INFRASTRUCTURE

CHAIRMAN SHUSTER'S INFRASTRUCTURE DISCUSSION DRAFT

On July 23, House Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA) released "discussion draft" legislation addressing a broad range of transportation and infrastructure priorities within the jurisdiction of his committee. Chairman Shuster is retiring at the end of this congressional term, so is free from many of the political constraints that govern transportation policy-making in Congress. He intends for his proposal to prompt discussions among members of Congress about the future of infrastructure in the United States and to serve as a blueprint for any infrastructure proposal

Congress may consider next year, particularly in the context of reauthorizing surface transportation programs before the Fixing America's Surface Transportation (FAST) Act expires at the end of FY 2019. His legislation directly addresses the thorniest issue facing the surface transportation program today – how to restore the solvency of the Highway Trust Fund (HTF) – and includes policy changes, such as ways to expedite project approvals, aimed at supporting smarter and more efficient infrastructure investment.

HTF Revenue Solution

The proposal would address the HTF revenue shortfall by increasing federal fuel taxes and broadening the HTF tax base by taxing transit, electric vehicles, and bicycles. Together, these revenue adjustments would raise $284 billion for the HTF over the next 10 years. Specific tax measures include:

- Increasing the federal gas tax by 15 cents per gallon and the diesel fuel tax by 20 cents per gallon over three years and then indexing both to inflation;
- No longer refunding gas and diesel taxes for fuel used in mass transit buses and establishing a 4.3 cent per gallon diesel fuel tax on commuter rail; and
- Establishing a 10 percent sales tax on both electric vehicle batteries and bicycle tires.

These tax increases are only offered as stopgap remedies. The proposal would also establish a national vehicle-miles-traveled (VMT) pilot program to examine the possibility of replacing the gas and diesel taxes with VMT-calculated revenues. It would also establish a blue ribbon panel to evaluate surface transportation system needs, determine the necessary HTF revenues to meet those needs, and identify revenue solutions. The Commission would not be permitted to propose simply extending federal gasoline or diesel fuel taxes.

Multi-modal Proposals

Chairman Shuster's proposal would also authorize the very popular National Infrastructure Investments program (commonly known as the Transportation Investment Generating Economic Recovery (TIGER) program and now the Better Utilizing Investments to Leverage Development (BUILD) program) long funded by appropriators without an authorization, providing up to $3 billion in funding per year. The program would largely retain its current form, with minimum grant sizes of $25 million and a maximum federal share of 80 percent.

FY 2019 TRANSPORTATION APPROPRIATIONS

The Senate passed its FY 2019 Transportation, Housing and Urban Development (THUD) appropriations bill on August 1. The Senate THUD bill includes an increase in funding of about $10 billion over FY 2017 for a wide range of transportation and infrastructure programs, similar to the significant increase included in the FY 2018 spending bill.

- Transit Formula Funding: The Senate provides $800 million above FAST Act-authorized levels for Federal Transit Administration (FTA) formula programs. This includes: $161.4 million for competitive bus grants; $29.5 million for competitive low- and no-emission bus grants; $362 million for Section 5337 state of good repair formula grants; and $30 million for Section 5304(d) high-density formula grants.
- TIGER/BUILD Grant Funding: The Senate provides $1 billion for the TIGER/BUILD grant program. This amount, while a significant decrease from the $1.5 billion provided in FY 2018, is well above

the $500 million usually provided for TIGER in prior year spending bills. The bill also requires the Department of Transportation (DOT) to use FY 2016 grant selection criteria for the FY 2019 program.

- CIG Funding: The Senate provides $2.55 billion for the Capital Investment Grant (CIG) program, an increase above the $2.3 billion FAST Act-authorized level, but a decrease from the $2.64 billion provided in FY 2018. The Senate also expressed concern with what it views as unnecessary delays in advancing CIG projects through the CIG pipeline, and directed the Secretary to advance all projects that meet the statutory criteria.

The House Appropriations Committee approved the House's FY 2019 THUD appropriations bill in May, though it is still unclear when the House will consider its THUD bill. The House bill also includes an increase in funding of about $10 billion, relative to FY 2017, for a wide range of transportation and infrastructure programs.

- Transit Formula Funding: The House also provides $800 million above FAST Act-authorized levels for FTA formula programs. This includes: $300 million for competitive bus grants; $50 million for competitive low- and no-emission bus grants; $50 million for Section 5311 rural formula grants; $200 million for Section 5337 state of good repair formula grants; $50 million for Section 5304(d) high-density formula grants; and $150 million for Section 5338 urbanized area formula grants.
- TIGER/BUILD Grant Funding: The House provides $750 million for the TIGER/BUILD grant program. The House included language directing DOT to not consider federal cost-share as a selection criteria and to release the notice of funding opportunity within 60 days of passage.
- CIG Funding: The House provides $2.61 billion for the CIG program. Like the Senate bill, the House funds the CIG program above its FAST Act-authorized level. The House also included language directing the Secretary to advance projects that meet the statutory criteria for advancement.

FEDERAL AVIATION ADMINISTRATION (FAA) REAUTHORIZATION

The House passed its FAA reauthorization bill, the *FAA Reauthorization Act of 2018* (H.R. 4), on April 27, after House Transportation and Infrastructure Committee Chairman Shuster agreed to halt his efforts to include a controversial air traffic control (ATC) reform proposal. The bill passed the House overwhelmingly, by a vote of 393-13.

It is currently unclear if and when the Senate will consider its FAA reauthorization bill, the *Federal Aviation Administration Reauthorization Act of 2017* (S. 1405). Senate Commerce Committee Chairman John Thune (R-SD) and Ranking Member Bill Nelson (D-FL) have been negotiating an agreement regarding amendments and floor time over the past few months. At this time, it appears that provisions related to trucking hours of service and rest breaks are holding up the negotiations.

FAA reauthorization is considered a must-pass bill; however, it remains unclear whether Congress will pass another short-term extension or a long-term reauthorization before FAA programs expire on September 30. Chairman Thune has repeatedly expressed his desire to pass a long-term authorization bill this year.

AUTOMATED VEHICLES (AVS)

Senators continue working to resolve outstanding differences in order to pass the *American Vision for Safer Transportation through Advance of Revolutionary Technologies* (AV START) *Act* (S. 1885), including amendments related to federal preemption, cybersecurity safeguards, consumer privacy protections, and

transportation data planning reporting requirements. Senator Gary Peters (D-MI) is seeking to add the AV START Act to the Senate's FAA bill.

HOUSING AND COMMUNITY DEVELOPMENT

GAO Report: Lead Paint in Housing

In July, the Government Accountability Office (GAO) issued a report on the U.S. Department of Housing and Urban Development's (HUD) efforts to monitor housing agency compliance with lead paint rules. Although HUD Secretary Ben Carson has taken a particular interest in tackling lead paint in public housing, the federal watchdog agency identified a variety of limitations with HUD's monitoring efforts, including reliance on local agencies' self-certifying compliance with related regulations and difficulties identifying children with elevated blood lead levels. Specifically, GAO recommended that HUD further improve efforts in the following areas: (1) lead grant programs; (2) oversight; (3) inspections; and (4) performance assessment and reporting. In total, nine formal recommendations were made to the agency.

Rental Assistance Program Overhaul

HUD's FY 2019 budget proposal noted that "changes are needed to [the agency's] rental assistance programs to provide a sustainable means to help those in greatest need and create the right incentives for work-able families to improve their earnings and economic standing." In line with this sentiment, Secretary Carson unveiled a sweeping overhaul of federal rental assistance programs, which comprise the majority of HUD's annual budget. The administrative legislation, most commonly referred to as the *Making Affordable Housing Work Act of 2018*, would require congressional approval and includes reforms related to: (1) tenant rent contribution; (2) minimum tenant rent; (3) income verifications; (4) alternative rent structures; (5) rent and income calculations; (6) work and job training requirements; (7) hardship exemptions; and (8) utility reimbursements. Three rental assistance programs account for roughly 80 percent of total HUD appropriations: (1) Section 8 tenant-based rental assistance, including Section 8 Housing Choice Vouchers; (2) Section 8 project-based rental assistance; and (3) public housing.

Widely panned by Democrats and public housing stakeholders, the plan is unlikely to gain traction in Congress given its highly partisan nature.

Affirmatively Furthering Fair Housing Rule

In August, Secretary Carson moved to revamp an Obama-era rule related to housing segregation despite related ongoing litigation. Under the regulation, localities that do not aggressively track and address patterns of segregation risk losing federal funding. Following HUD's January 2018 announcement that it would delay implementation of the Affirmatively Furthering Fair Housing Rule, multiple civil rights groups sued the agency.

According to the associated Advanced Notice of Proposed Rulemaking, which solicits public comments by October 14, 2018, HUD's five proposed changes to the rule would: (1) cut regulatory burdens; (2) focus rule analysis on results; (3) provide localities with greater control; (4) encourage housing choice and expanded housing supply; and (5) "more efficiently utilize" HUD resources. Public housing advocates have widely decried the Administration's actions, consistently noting that the rule involved countless stakeholders during its development and requires jurisdictions to take actions that reverse historic patterns of segregation and other forms of discrimination.

NOTABLE LEGISLATIVE ACTIVITY

In mid-July, the House Financial Services Committee passed, on a party-line vote, the *Fostering Stable Housing Opportunities Act of 2017* (H.R. 2069/S. 1638). The legislation, which aims to bolster housing assistance to youth aging out of the foster system, imposes a variety of work, education, training, and self-sufficiency requirements on those seeking eligibility for support. While public housing organizations noted the bill's inclusion of a grace period for individuals unable to meet these requirements, they have expressed widespread concern with the precedent being set by the legislation. No action has been taken on the introduced Senate companion bill.

Public housing proponents have largely rallied around Rep. Jim Clyburn's (D-SC) *Restoring Tax Credits for Affordable Housing Act* (H.R. 6542). The bill, which would increase the low-income housing tax credit annual allocation and raise the credit percentage formula, could ultimately finance 235,000 affordable housing units projected to be lost over the next decade due to tax reform. The bill has not been considered since being referred to the House Ways and Means Committee in late July.

TAX

OPPORTUNITY ZONES

As reported in our last update, *The Tax Cuts and Jobs Act of 2017* (P.L. 115-97) established a new economic development program in which "Opportunity Zones" are designated to encourage long-term private investments in low-income communities by providing a federal tax incentive to promote capital investments in these areas nationwide. The Opportunity Zones program provides a tax incentive for investors to reinvest their unrealized capital gains into "Opportunity Funds" that are dedicated to investing into Opportunity Zones.

The zones' designations will remain in effect for 10 years. The underlying incentives with this program relate to the tax treatment of capital gains, and are tied to the longevity of an investor's stake in a qualified Opportunity Fund, providing the greatest benefit to those who hold their investment for 10 years or more.

Earlier this year, governors nominated up to 25 percent of their state's Low-Income Community census tracts for Opportunity Zone designation. These nominations were subsequently confirmed by the Department of the Treasury. A full list of Opportunity Zones in each state can be found here.

Currently, the Treasury Department and the Internal Revenue Service (IRS) are developing legal guidance on this new incentive.

STATE AND LOCAL TAX CREDITS (SALT)

Last month, the Internal Revenue Service (IRS) and the Department of the Treasury published a notice of rulemaking on "Contributions in Exchange for State and Local Tax Credits" that would limit the deductibility of state and local charitable contributions. The proposal comes as several states have recently authorized or expanded some state charitable tax credit programs in the wake of the $10,000 cap to the state and local tax (SALT) deduction included in last year's *Tax Cuts and Jobs Act of 2017*.

Since adoption of the federal tax package, several states have authorized or are considering authorizing the creation of state and local "excellence" funds, which are programs for public charities that fund police, education, and other public services. In exchange for donations, the state or local government would offer donors accompanying tax credits – sometimes close to a dollar for dollar match – to reduce state and local tax liabilities. Unlike SALT, the charitable donation deduction still has no cap, so donors can continue to deduct an unlimited amount of charitable contributions on their federal income tax returns.

Under IRS' and Treasury's new proposal, taxpayers would need to subtract the value of state and local tax credits from their federal charitable deductions on tax returns if the state and local credits are worth more than 15 percent of the value of the contribution. For example, if a $1,000 donation comes with a $600 state/local credit, the taxpayer will now only be able to write off $400 worth of the contribution. The proposal will not change the value of federal charitable deductions that are coupled with state/local deductions.

Comments on the proposed rule are due on October 11. The IRS will hold a public meeting on the proposed rule on November 5.

TAX REFORM 2.0

While the implementation of the *Tax Cuts and Jobs Act of 2017* is making progress with the Department of the Treasury focused on issuing guidance as soon as possible, a similar level of activity should not be expected on Capitol Hill. Though the House Ways and Means Committee published its "Tax Reform 2.0" outline on July 24, prospects of that plan becoming law this year are fairly low. The Committee's broad outline focuses on: (1) making certain temporary provisions in *Tax Cuts and Jobs Act* permanent; (2) bolstering savings; and (3) fostering innovation. That said, given the uphill battle the legislation would face in the Senate, the outline mostly serves as a messaging exercise for House Republicans in advance of the mid-term elections less than 70 days away. Though chances of any new tax legislation becoming law this year are remote, more proposed regulations are expected in the coming months.

TRADE

NAFTA – NEW U.S.-MEXICO AGREEMENT TO REPLACE NAFTA 1.0

Talks to modernize NAFTA stalled at the beginning of the third quarter and resumed in a bilateral format between the United States and Mexico in July, after the Mexican presidential elections earlier that month. Canada only returned to negotiations after U.S. President Donald Trump and Mexican President Enrique Peña Nieto announced the U.S.-Mexico Trade Agreement had been reached in principle on August 27. President Trump noted the new agreement should not include the name "NAFTA," and he said NAFTA 1.0 would be terminated in light of the new deal with Mexico. Mexico continues to advocate for Canada to join the agreement and ultimately return it to a trilateral format. Meanwhile, the Trump Administration submitted its formal notification of the bilateral agreement with Mexico to Congress on Friday, August 31.

Despite Canada not reaching an agreement in principle prior to the Trump Administration's notice to Congress, the formal notification holds open the possibility of Canada joining the bilateral deal. U.S. Trade Representative Robert Lighthizer has stated the U.S.-Mexico deal would be signed by the end of November, in accordance with Trade Promotion Authority (TPA) and in alignment with Mexico's desire to have President Peña Nieto sign it prior to departing office on November 30. Canada is expected to

continue negotiating its possible participation in the bilateral agreement in September, despite a set-back after some off-the-record comments by President Trump were leaked on Thursday, August 30, whereby President Trump reportedly said he would not compromise with Canadian Prime Minister Justin Trudeau.

Shortly after the announcement of the bilateral deal, the Office of the U.S. Trade Representative (USTR) released fact sheets related to the U.S.-Mexico Trade Agreement focused on manufacturing, agriculture, and more broadly on the NAFTA 1.0 modernization efforts. Notably missing from the agriculture fact sheet is the seasonality produce matter. According to Administration officials, the agreement reached with Mexico has touched on all of NAFTA 1.0 chapters and improved them, as well as added new provisions (e.g., addressing digital trade, state-owned enterprises, currency manipulation, and financial services). The agreement is said to essentially "plus up" provisions found in the Trans-Pacific Partnership (TPP) and includes a 16-year term that will be reviewed every six years.

Details continue to emerge on the new bilateral agreement; with negotiations ongoing with Canada, it remains unclear what the final legal texts of the new deal could include. Sixty days prior to the signing of the agreement (expected in November), the Administration must publicly post the text of the agreement and submit a list of any changes to U.S. law, which would be near the end of September. It also remains unclear whether the 115th Congress would entertain consideration of the bilateral deal, prior to its adjournment on January 3, 2019.

The general consensus is the House and Senate parliamentarians are the ones who will ultimately decide whether TPA applies to the bilateral U.S.-Mexico (currently sans Canada) Trade Agreement. This would include whether the bilateral deal conforms with the June 2017 notification the Trump Administration sent to Congress that details its intention to re-negotiate NAFTA with Mexico and Canada. Congress may also not have the political will for adding floor consideration of implementing legislation during an election year, which could complicate the timing of the introduction of the implementing bill and related TPA requirements this year.

TARIFFS AND RETALIATION

The Administration's imposition of Section 232 and 301 tariffs during the third quarter resulted in retaliatory actions by major U.S. trading partners, including the European Union, Canada, Mexico, and China. Adding to the global trade tension, the Administration launched another Section 232 investigation exploring the national security implications of uranium imports – and bringing the total number of 232 investigations to date to four (steel, aluminum, automobiles/automotive parts, and now uranium). Just before the end of August and despite a growing trade war, the United States and China failed to reach a breakthrough or announce a follow-on date for further bilateral trade talks. Meanwhile, additional Section 301 tariffs are teed up for imposition, likely in September – with China poised to retaliate in kind.

While Congress has introduced some bills related to constraining the Executive Branch's use of Section 232 national security investigations and toward mitigating the impact of these duties on allied nations, none of the bills have significantly advanced in either chamber. Some members have also expressed concerns related to the growing trade war with China and the negative impact to American consumers. However, Congress also remains concerned with China's trade policies and practices; therefore, has instead sought assurances for mitigating the impact of China's retaliation, particularly for the U.S. agriculture sector. The Administration remains committed to ensuring trade reciprocity and in seeking to have China address its trade practices.

Section 232 Investigations. Users of covered steel and aluminum products based in the United States continued to file petitions to exclude their products from the related Section 232 tariffs during the third quarter, with some claiming the domestic market cannot satisfy their demand. On August 29, President Trump signed two Presidential Proclamations, allowing Secretary of Commerce Wilbur Ross to provide targeted relief from quotas imposed under Section 232 on steel from South Korea, Argentina, and Brazil, and aluminum from Argentina. The Secretary is expected to issue procedures for the requests for exclusion from the quotas in the near-term.

Secretary Ross spoke at the Department's public hearing on its Section 232 investigation into imports of automobiles and automotive parts on July 19. Amid objections from the automotive industry, Secretary Ross said: "It is too early now to say if this investigation will ultimately result in Section 232 recommendations on national security grounds." While some anticipated the Commerce Department would have its final recommendations related to the 232 autos investigation completed by the end of August, Secretary Ross said the report would be delayed until September.

During its bilateral trade talks, Mexico sought to be exempted from the expected 232 autos tariffs. It is believed the two sides are seeking to find a way to align the expected 232 auto tariffs with the agreement reached on the automotive rules of origin in the new bilateral U.S.-Mexico Trade Agreement. Mexico has reportedly retained its right to challenge the United States on any 232 autos tariffs at the World Trade Organization.

On July 18, the Commerce Department announced the initiation of a Section 232 investigation into the national security implications of uranium imports, a probe requested in January by two U.S. uranium mining companies. According to the Commerce Department, "The investigation will canvass the entire uranium sector from the mining industry through enrichment, defense, and industrial consumption." Secretary Ross also sent a letter to Secretary of Defense Jim Mattis notifying him of the action.

Section 301 Investigation. On July 6, the Administration imposed its first tranche of Section 301 tariffs on Chinese goods (subject to 25 percent duties) in response to China's technology transfers policies and Intellectual Property (IP) practices. In a tit-for-tat response, China retaliated in a similar manner, targeting U.S. farmers and ranchers in particular.

The Administration held six-day public hearings toward the end of August on a second tranche of tariffs for a proposed list of $200 billion in Chinese products that would potentially be subject to a ten percent tariff. A final decision on the second tranche of proposed goods is expected in September. China is again expected to match its retaliation, if the U.S. implements duties on the second tranche of goods next month.

MTB Update

This coming Tuesday, September 4, the House of Representatives is scheduled to vote on the Senate-amended Miscellaneous Tariff Bill (MTB), under suspension of the rules. The Senate passed an amended version of the previously House-passed MTB (H.R. 4318) on July 26. If passed by the House and signed by the President, the MTB measure would take effect 30-days thereafter. The MTB would also extend customs user fees through October 13, 2027.

ENERGY AND ENVIRONMENT

CLEAN POWER PLAN

The Trump Administration recently released its rewrite of the Obama Administration's Clean Power Plan (CPP). For background, the Obama Administration's CPP is a set of standards established in August 2015 intended to reduce carbon emissions from power plants. Prior to the issuance of the CPP, power plants were allowed to emit unlimited amounts of carbon pollution into the air. The Clean Power Plan rule was expected to provide a 32 percent cut in power-plant carbon-dioxide emissions by 2030 (from 2005 levels). The CPP, which took a regional and national approach to gaining greenhouse gas (GHG) reductions, sometimes called "beyond the fence-line of the power plant," allowed states to encourage the use of renewable energy such as solar and wind in order to attain goals set by the plan. The CPP was also intended to enable the U.S. to deliver on its commitments to the Paris climate agreement.

President Trump's new proposed plan, called the "Affordable Clean Energy (ACE)," aims to take a state-only approach and would limit states' abilities to regulate coal-fired power plants to "within the fence-line" parameters. In its proposed rule, EPA is putting forth three distinct actions. First, EPA is proposing to replace CPP with its revised proposed emissions guidelines (the ACE rule) addressing existing coal-fired power plants that are intended to inform the formulation of state plans. Second, EPA is proposing new regulations that would direct both EPA the states on implementation of emissions guidelines. Of note, EPA highlights that these new proposed regulations are intended to apply to this action and any future emission guideline issued under section 111(d) of the Clean Air Act (CAA). Third, and possibly one of the most controversial, the agency is proposing revisions to the New Source Review (NSR) program that may allow coal-fired power plants to avoid certain emission controls all together. Comments on the proposed plan are due by Oct. 30.

The proposal is estimated to reduce 2030 CO2 emissions by only 0.7 percent to 1.5 percent, as compared to the former Administration's CPP's anticipated 32 percent reductions in greenhouse gases. The ACE contains no overarching goal for the U.S. to reduce emissions, which environmentalists and various business leaders are concerned will prohibit the country from making good on the Paris climate agreement. The new plan aims to make coal more affordable by cutting back on certain upgrades and related emissions requirements, and to avoid some of the permitting required by the "New Source Review" process. Under the proposed rule, states will be able to regulate, do nothing, or opt out.

OZONE

On August 1, after more than a year of the Trump Administration stating it would repeal the ground-level ozone rule, EPA announced it would keep the 2015 rule intact. The agency is now expected to focus on its anticipated October 2020 review where the agency could tighten or loosen the National Ambient Air Quality Standards (NAAQs) that are contained within the rule. In the meantime, environmental groups are still suing over the 2015 rule, which they believe is not tough enough to protect human health and to prevent asthma, bronchitis, and emphysema. A court date has not yet been set, but is expected this fall.

PFAS

EPA is wrapping up its listening sessions across the U.S. on the growing national anxiety over per- and polyfluoroalkyl substances (PFAS). PFAS is the non-stick, toxic chemical found in Teflon and fire-retardants and has increasingly been detected in drinking water. In efforts to obtain a more immediate result to

address the concern, two bipartisan bills led by Senator Debbie Stabenow (D-MI) have recently been introduced in the Senate in effort to address PFAS.

The PFAS Accountability Act of 2018 (S. 3381) would urge the Department of Defense to hasten its process of cooperative agreements with states in order to investigate and clean up contamination from the chemicals; however, this cleanup would only occur at military bases.

The PFAS Detection Act of 2018 (S. 3382) would authorize $45 million for the U.S. Geological Survey to develop new technologies to detect PFAS and conduct nationwide sampling. The need for innovative technologies is primarily due to the fact that it is difficult to test for PFAS because current testing equipment itself contains PFAS.

EPA is also still in the process of developing tests for PFAS in drinking water. EPA has stated it will develop a "PFAS Management Plan" that is expected to be released in fall 2018.

While EPA has set a health advisory level of 70 parts per trillion for lifetime of exposure to PFAS contaminants from drinking water, the Centers for Disease Control and Prevention (CDC) has indicated that some of these contaminants can pose health dangers at significantly lower levels than EPA had previously said were safe. The Senate will hold a hearing on PFAS on September 26.

The House Committee on Energy and Commerce, Subcommittee on Environment, announced it will hold a hearing on PFAS titled "Perfluorinated Chemicals in the Environment: An Update on the Response to Contamination and Challenges Presented" on Thursday, September 6.

GHG EMISSIONS STANDARDS (CARS AND LIGHT TRUCKS)

Earlier this year, then-EPA Administrator Scott Pruitt made the highly controversial announcement that he would act to roll back GHG emissions and fuel economy standards for cars and light trucks. The concern around tampering with the existing Corporate Average Fuel Economy (CAFE) standards is that it could set up dual or multiple emission standards with which car manufacturers and their suppliers would have to comply. California currently has a Clean Air Act waiver to enforce its own stricter rules, and approximately 12 other states follow California's stricter rules. If EPA and the National Highway Traffic Safety Administration (NHTSA) weaken the current standards, the action could lead to a patchwork of required compliance for numerous areas in the U.S. Reportedly, most automakers are not calling for rolling back the standards.

On August 24, EPA and NHTSA issued its proposed rule, titled "Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" (SAFE Vehicles Rule). The SAFE Vehicles Rule, if finalized, would lessen certain existing CAFE and tailpipe carbon dioxide emissions standards for passenger cars and light trucks and establish other new standards, all covering model years 2021 through 2026.

The agencies will jointly hold three public hearings in Washington, DC, Detroit, MI, and Los Angeles, CA. The agencies will announce the specific dates and addresses for each hearing location in a supplemental Federal Register notice. Comments on the proposed rule are due October 23.

ENERGY & ENVIRONMENT LEGISLATION

Below are several pertinent energy and environment-related bills that have recently advanced in Congress:

House

- House Natural Resources Committee Chairman Rob Bishop (R-UT) and Committee Ranking Member Raúl Grijalva (D-AZ) recently introduced the bipartisan *Restore Our Parks and Public Lands Act* (H.R. 6510), establishing the National Park Service and Public Lands Restoration Fund.
- The House passed a bipartisan Magnuson-Stevens reauthorization bill, the *Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act* (H.R. 200). Introduced by Representative Don Young (R-AK), the bill aims to modernize the Magnuson-Stevens Act by implementing regional flexibility, tailored management practices, and improved data collection for federal fisheries.

Senate

- The Senate passed S. 724, a bill which has subsequently become law, to amend the Federal Power Act to modernize authorizations for necessary hydropower approvals. The law provides Federal Energy Regulatory Commission (FERC) with authority to extend the construction start time for a licensed hydropower project for up to 10 years without an act of Congress.
- The Senate Committee on Environment and Public Works advanced bipartisan carbon-capture legislation, the *Utilizing Significant Emissions with Innovative Technologies (USE IT) Act* (S. 2602), which would support carbon utilization and direct air capture research. The bill would also support federal, state, industry, and non-governmental collaboration in the construction and development of carbon capture, utilization, and storage facilities and carbon dioxide (CO2) pipelines.
- The *Energy and Natural Resources Act of 2017* (S. 1460) is the comprehensive bill that Senate Energy and Natural Resources Committee Chair Lisa Murkowski (R-AK) and Ranking Member Maria Cantwell (D-WA) have been working on for several years. The bill is being readied for Senate floor action; however, there is still an opportunity to request changes.

WATER

WATER INFRASTRUCTURE FINANCE AND INNOVATION ACT (WIFIA)

This month, the Environmental Protection Agency (EPA) announced it received 62 Letters of Interest (LOIs) requesting $9.1 billion in loans for its FY 2018 Water Infrastructure Finance and Innovation Act (WIFIA) program. The prospective borrowers reflect a wide diversity of geographical locations and projects, with the majority of applicants being municipal government agencies, and others being small communities, public-private partnerships, corporations, and a tribe. The prospective projects are located within 26 different states and territories, including Guam and the District of Columbia, and focus on wastewater, drinking water, water recycling, desalination, and stormwater management projects.

The WIFIA program received $63 million in funding in the FY 2018 Omnibus, which more than doubles the program's funding from FY 2017. For FY 2019, the House is proposing providing $75 million for WIFIA, while the Senate proposes providing $63 million.

WATERS OF THE U.S. (WOTUS) RULE

Last month, a federal judge ruled that the Trump Administration violated administrative legal requirements when it delayed the start of the Obama Administration's 2015 "Waters of the United States" (WOTUS) rule. As we reported in January, the Environmental Protection Agency (EPA) released its final rule to delay the effective date of the 2015 WOTUS rule for two years as it works to write its own version of the rule.

The recent ruling caused the 2015 rule to go into effect in 26 states. There will continue to be a stay on the rule in the 24 other states (Georgia, Alabama, Florida, Indiana, Kansas, North Carolina, South Carolina, Utah, West Virginia, Wisconsin, Kentucky, South Dakota, Missouri, Alaska, North Dakota, New Mexico, Idaho, Arizona, Nebraska, Montana, Arkansas, Nevada, Colorado, and Wyoming) that currently have additional lawsuits challenging the 2015 rule. Specifically, the judge wrote that EPA and the Army Corps of Engineers failed to consider any public comments that were submitted that addressed substantive issues related to the 2015 or earlier 1982 rule when it delayed the 2015 rule for two years.

The 2015 WOTUS rule clarified the federal government's regulatory authority under the Clean Water Act over streams, wetlands, rivers, and lakes. Under the 2015 rule, approximately 60 percent of previously unregulated bodies of water will be regulated by the federal government as Waters of the United States. If EPA determines that projects involve any discharge of any pollutant into the waters covered under the rule, regardless of the environmental effects of the discharge, a federal permit is required from the individuals, businesses, or industries involved in the project. The rule covers the following areas that were not previously regulated by the federal government:

- Tributaries if they "show physical features of flowing water," such as a bank or ordinary high water mark;
- Waters adjacent to rivers and lakes if the water affects the chemical, physical, or biological integrity of a body of water downstream;
- Specific regional waters such as prairie potholes, bays, coastal prairie wetlands, and similar waters if they are adjacent to jurisdictional tributaries; and
- Ditches constructed out of streams or that function like streams.

The Trump Administration is continuing to work to finalize its repeal and replacement of the 2015 WOTUS rule, with expectations that a proposed rule will be released before the end of the year.

WATER RESOURCES DEVELOPMENT ACT (WRDA)

Both chambers have made great progress on the Water Resources Development Act (WRDA) for 2018, generating promise that Congress will be able to reconcile and pass the legislation before the end of the year. WRDA legislation invests in and provides for improvements to the nation's ports, inland waterways, dams, flood protection, ecosystem restoration, and other water resources infrastructure.

In June, the House passed its version of the bill, the *Water Resources Development Act of 2018* (H.R. 8), by a vote of 408-2. The House version of the bill sticks to the traditional purpose of WRDA by containing measures that only pertain to the U.S. Army Corps of Engineers (USACE). Recently, in 2014 and 2016, WRDA legislation has contained additional measures concerning EPA.

In May, the Senate Committee on Environment and Public Works reported out its version of the bill, *America's Water Infrastructure Act of 2018* (S. 2800). The bill has yet to be brought to the Senate floor. Unlike the House's version of the bill, it contains controversial provisions related to EPA.

While the Senate has yet to pass its version of the legislation, we understand that House and Senate staff are already in discussions on a final bill.

MANAGING EXCESS FLOWS AT WASTEWATER TREATMENT PLANTS

Earlier this year, EPA announced its plans to look at issues associated with managing and treating peak flows during wet weather events at publicly owned treatment works operations (POTWs) with separate sanitary sewer systems. In its notice, EPA specified that rainwater that inadvertently enters sewer systems increases flows to wastewater treatment plants, potentially creating operational challenges. EPA is planning to consider changes to its National Pollutant Discharge Elimination System (NPDES) regulations to establish a lasting approach to permitting flexible peak flow management strategies. EPA noted the goal of this effort is to provide a regulatory structure that allows for the continuous effective operation of treatment plants and the protection of water quality and public health.

Last month, EPA announced that it will hold three public listening sessions in October to seek input on future rulemaking (October 16 in Washington, DC; October 24 in Lenexa, KS; and October 30 online). Public comments can also be submitted online until October 31.

HEALTHCARE

HEALTH REFORM

Republican efforts to repeal and replace the *Affordable Care Act* (H.R. 3590/ACA), more commonly known as Obamacare, have largely slowed in advance of the 2018 midterm elections. Since April, Senate discussions surrounding insurance marketplace stabilization legislation have ceased due to bipartisan disagreements. Senate Health, Education, Labor, and Pensions (HELP) Committee Chairman Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA) had spent months working with colleagues on a proposal that would curb premium increases by funding a reinsurance program and substantially increasing ACA enrollment outreach efforts, but differences surrounding abortion policy halted their efforts. While most GOP senators indicated that they were no longer prioritizing the repeal or replacement of ACA, Senate Democratic leadership, including Senator Murray, have repeatedly emphasized their willingness to return to stabilization talks.

In late July, the House passed several bills that would expand the availability and use of health savings accounts (HSAs), further delay an ACA-related tax on health insurers, and repeal ACA's medical device tax. While Senate Republicans have not outlined any plans to consider the legislation this year, passage of the measures provided the GOP with healthcare messaging during interactions with constituents during August recess, as well as in advance of the September midterms. Conservative members and stakeholders expressed grave disappointment that House GOP leadership opted not to vote on legislation that would repeal the 40 percent tax on high-cost health insurance plans, or the Cadillac tax, as well as a bill designed to mitigate the ACA's employer mandate. Interested parties have vowed to continue pressing their case to Senate lawmakers, who may be more willing to consider individual health bills during the new Congress.

Despite a general consensus that GOP health reform proposals will not see movement in the near future, some members of the party have remained committed to the issue. In late May, Senator Bill Cassidy (R-LA) put forth a white paper on ways to lower healthcare costs, including a series of potential reforms to the ACA. Generally, the wide-ranging blueprint proposed: (1) passage of the Senate's stalled bipartisan market stabilization legislation; (2) codifying short-term health insurance plans and permitting their ability to be guaranteed renewable; (3) providing states with funding to encourage young consumers to purchase ACA exchange health insurance plans; (4) granting states with authorities to combine their Medicaid expansion and individual market risk pools; (5) instituting drug pricing reforms; (6) expanding federal support of nationwide telemedicine initiatives; (7) repealing ACA's medical device tax; and (8) finalizing broad mental health reforms. While Senator Cassidy acknowledged that the blueprint is unlikely to result in an imminent legislative package, he expressed optimism that the framework would encourage continued discussions on GOP-led efforts to tweak the ACA.

In June, a conservative coalition known as the Health Policy Consensus Group issued their Health Care Choices Proposal, which outlines a variety of health reform policy recommendations to Congress. Backed by right-leaning organizations such as the Heritage Foundation and Galen Institute, as well as former Pennsylvania Senator Rick Santorum (R), the plan is centered on instituting a federal block grant program that would allow states to expand medical coverage offerings. In addition, the framework proposes curtailing the majority of ACA's regulations related to consumer protections, shifting individuals from Medicaid to private coverage options, expanding eligibility for HSAs, and bolstering the amount an individual or family can contribute annually to their tax-free HSA. While widely supported by conservative factions of Congress, the effort has very little, if any, chance of being formally considered this year.

Most recently, 10 Senate Republicans released a bill that would guarantee protections for patients with pre-existing conditions as outlined in the ACA. Specifically, Senator Thom Tillis (R-NC) sponsored a measure that would amend the *Health Insurance Portability and Accountability Act* (H.R. 3103/HIPAA) to ensure that individuals with pre-existing conditions are not denied coverage or charged higher rates in the individual or group health insurance markets. While the measure signals some Republicans' commitment to provisions of the Obama Administration's signature legislative achievement, it likely emerged in response to a lawsuit brought by Texas and other conservative states seeking to overturn the constitutionality of the ACA following Congress' elimination of the law's individual mandate. In August, the Department of Justice (DOJ) declined to defend certain provisions of the ACA in the case, including those that prohibit discrimination based on pre-existing conditions. Republicans behind the measure maintain that it would protect individuals with pre-existing conditions were the court to rule in favor of the states or the DOJ. Oral arguments in the case are set to begin on September 5, 2018.

Despite the lack of formal legislative action, the Trump Administration has continued to leverage its regulatory authorities to reform the ACA and carry out the President's health reform agenda. In late July, the U.S. Centers for Medicare and Medicaid Services (CMS) issued an interim final rule that resumed the ACA's risk adjustment collections and payments to insurers for the 2017 plan year. The move, which was long sought by the health insurance industry, came after CMS temporarily suspended the disbursements following a New Mexico federal court ruling that raised questions surrounding a budget-neutral payment system put forth by the agency. Upon restoring the risk adjustment program, CMS Administrator Seema Verma noted that the Administration's decision would maintain stability and predictability in the individual and small group health insurance markets. Additionally, she suggested that the move will "preserve the significant investment made by states, issuers, and the federal government to stand up the program."

In mid-July, a federal judge ruled in favor of the Trump Administration's decision to halt cost-sharing reduction payments (CSRs) to health insurers participating in the ACA marketplace by dismissing a lawsuit brought by 18 states and the District of Columbia. While the involved attorneys general had requested that the case be put on hold, the court permitted states to refile if HHS ever moves to prohibit "silver loading," which occurs when health insurers compensate for a lack of CSR payments by hiking the premiums of silver marketplace plans. To date, the practice has generally kept bronze and gold plan premiums from skyrocketing in light of the temporarily ceased federal reimbursements to insurers.

In August, CMS awarded $8.6 million in remaining Obamacare grants to 30 states and the District of Columbia. The funds, which remain active for two years, are largely intended to support state insurance departments' efforts to implement federal insurance reforms and consumer guarantees related to ACA marketplaces. In its entirety, the ACA allocated $250 million for states to better their review of annual insurance rate filings. State grant applications indicate that the funding will be used to further reforms related to essential health benefits (EHBs), as well as guaranteed coverage availability and renewability. Every state that applied received funding, with grants ranging from $225,000 in Iowa to $290,000 in Pennsylvania.

As expected, the Trump Administration moved to finalize a rule that would permit consumers to maintain short-term limited-duration health insurance plans (STLDIs) that circumvent ACA-related regulations. The plans remain active for just under a year and can be renewed for up to 36 months. STLDIs, which were historically designed for individuals between jobs or forms of health insurance coverage, are not required to cover the ACA's 10 EHBs or comply with premium expenditure and pre-existing condition standards. The plans, which are typically less expensive that others solid in individual market exchanges, are part of the Administration's efforts to expand affordable health insurance options for Americans. The rule reverses Obama-era directives to shorten the length of time one could maintain an STLDI to just under three months, and will officially take effect in October 2018. However, HHS officials have suggested that the plans will likely not be sold until 2019.

Proponents of Obamacare have maintained that STLDIs could further weaken insurance marketplaces by incentivizing healthy individuals to terminate their exchange plans, ultimately worsening risk pools and hiking premium costs. In response to the rule finalization, four localities filed a lawsuit against the Trump Administration in early August. The cities – Baltimore, MD, Columbus, OH, Cincinnati, OH, and Chicago, IL – argue that HHS has attempted to dissuade consumers from enrolling in comprehensive ACA plans, reduce choices in ACA exchanges, and spread uncertainty to insurance markets in violation of a constitutional clause that mandates the president to "take care that the laws be faithfully executed." The Trump Administration has typically cited the *Administrative Procedure Act* (S. 7) when making attempts to fundamentally adjust or dismantle the 2010 health law.

Meanwhile, the Department of Labor (DOL) dealt another blow to the ACA by finalizing guidance to expand association health plans (AHPs), which permit small businesses and trade groups to band together to purchase health coverage outside of the ACA's insurance markets. Democrats widely panned these new rules and classified them as the latest act of ACA "sabotage," while also expressing concern that they would further drive up premiums and erode patient protections offered by the law. Many business groups, including the National Federation of Independent Business, praised the regulations as measures that encourage small business owners to provide healthcare for themselves and their employees. However, states have struggled to comprehend the degrees to with they can regulate and oversee AHPs sold within their borders.

Led by New York, attorneys general from 12 states and the District of Columbia sued DOL over its expansion of AHPs. The officials maintain that making AHPs broadly available violates consumer protections included in the ACA. In late August, the plaintiffs asked a federal judge to hand them an immediate legal victory by filing a motion for summary judgment.

Since April, funding for ACA Navigators has continued to drop. In early July, the Trump Administration outlined plans to cut Navigator funding even more drastically in 2019, slashing funds from $36 million for 2018 to $10 million for the upcoming year. In line with its priorities, the Trump Administration now encourages Navigator applicants to demonstrate ways in which they will inform individuals about alternatives to ACA exchange plans, such as STLDIs and AHPs. Democrats, as well as the U.S. Government Accountability Office (GAO), maintain that HHS policies to reduce Navigator funding have resulted in decreased ACA enrollment. In particular, GAO found that HHS' 42 percent cut to Navigator subsidies and outreach efforts in 2018 led to 68 percent fewer outreach events during the annual open enrollment period when compared to the prior year. Additionally, GAO stated that HHS' reversals on CSRs and ensuing consumer confusion about the status of Obamacare have stalled ACA enrollment. Despite these findings, the White House has maintained that Navigators are largely unnecessary.

PROPOSED HHS REORGANIZATION

In mid-June, the Trump Administration introduced a far-reaching federal reorganization plan that would rename HHS as the Department of Health and Public Welfare. Most notably, federal food stamps, or the Supplemental Nutrition Assistance Program (SNAP), would be shifted from the Department of Agriculture's jurisdiction to HHS. This transferal, as well as changing the name of the agency, would require congressional approval. Paramount to the renamed department would be a newly established and permanent Council on Public Assistance, which would maintain statutory authorities and responsibilities including, but not limited to: (1) approving service plans and waivers requested by states under Welfare-to-Work projects; (2) assuming enactment of the FY 2019 budget proposal; (3) designing uniform work requirements to be implemented across all welfare programs; (4) crafting cross-program standards for program applications, data verification, and program integrity; and (5) recommending programmatic and operational changes to eliminate barriers identified at the federal, state, and local levels related to welfare participant employment efforts.

While the White House does not need congressional authority to establish a task force, it does require lawmaker approval when permitting the council to make statutory changes to programs such as work requirements. Congressional endorsement of the Administration's plan, particularly from the Senate, remains unlikely.

AMERICAN PATIENTS FIRST DRUG PRICING BLUEPRINT

In May, President Trump sought to meet one of his primary campaign promises by releasing a federal blueprint to lower drug prices. In particular, the blueprint seeks to address: (1) excessively high drug prices; (2) seniors and government programs overpaying for drugs; (3) high out-of-pocket costs for consumers; (4) lack of transparency in drug pricing; and (5) free-riding by foreign nations as to U.S. investment in innovation.

HHS provided additional information on the scope of President Trump's blueprint with American Patients First, which is an overview of administration reforms in the following areas: (1) drug oversight by the U.S.

Food and Drug Administration; (2) coverage of drugs by government programs such as Medicare and Medicaid; (3) drug manufacturer rebates; and (4) drug pricing disparities between the U.S. and foreign nations.

Critics, particularly congressional Democrats, have widely panned the blueprint as ineffective and lacking specifics. In late August, HHS released a report on plan progress. It noted that the prices of 60 percent fewer brand name prescription drugs increased since the blueprint's May release, when compared with the same period last year. Additionally, the report cited a 54 percent increase in generic and brand-name drug price decreases in the time period from May 11 to August 15, compared with that timeframe last year. In addition, the Trump Administration has claimed responsibility for recent decisions made by several major drug manufacturers, including Pfizer and Merck, to temporarily roll back or cancel planned price increases on certain products.

HHS Secretary Alex Azar continues to defend the plan before congressional panels. Most recently, he urged Congress to pass legislation that would ban so-called "gag clauses," which prohibit pharmacists from informing patients that prescription drugs may be less costly when purchased out-of-pocket, as well as to repeal a provision of the ACA that limits rebates in the Medicare program. Secretary Azar also continues to urge lawmakers to back a bill that would block companies from abusing the 180-day generic exclusivity window, which oftentimes delays the entry of lower-cost generic drugs into the market.

MEDICAID WORK REQUIREMENTS

Since issuing policy guidance that encourages states to establish work requirements for Medicaid recipients, the Trump Administration has faced multiple lawsuits related to the measures. The CMS proposals, which exclude Medicaid enrollees with disabilities, the elderly, pregnant women, and children, were largely designed to target able-bodied, working-age individuals.

Shortly following the guidance issuance in January 2018, Kentucky Medicaid beneficiaries filed a federal lawsuit challenging the Trump Administration's authority to implement program work requirements without congressional approval. In late June, the DC District Court blocked Kentucky's 1115 waiver from taking effect and reprimanded CMS for failing to justify the ways in which work requirements promote Medicaid's goal of expanding health coverage. In another challenge to the Administration, consumer groups recently sued over CMS' approval of Medicaid work requirements in Arkansas. Mirroring the Kentucky program litigation, the lawsuit argues that the Administration overstepped its authority in approving the work rules, classifying the decision as "arbitrary" and "capricious," and that such requirements do not meet Medicaid's fundamental purpose.

Two other states – Indiana and New Hampshire – have received CMS approval to add work requirements to Medicaid, and nearly 10 other states have pending requests to do so. These include Alabama, Arizona, Maine, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Utah, and Wisconsin. However, Arkansas is the only state in which Medicaid work requirements have taken effect.

Despite these ongoing legal battles, HHS has doubled down on work requirements in recent weeks, committing to continue litigating the Kentucky case and approving similar rules in other states.

OPIOID CRISIS

Congress and the Administration have aggressively continued efforts to address America's opioid epidemic. In late June, the House overwhelmingly cleared a bill that serves as the legislative vehicle for nearly 60 already-passed proposals to combat the crisis. The *Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment* (SUPPORT) *for Patients and Communities Act's* (H.R. 6) passage concluded months of congressional hearings and two weeks of floor votes on various opioid measures, as well as marking one of Congress' most ambitious efforts yet to address the epidemic. The package, which incorporates Medicare, Medicaid, and public health reforms, gained immediate support from the White House. The following general provisions were incorporated in the bill:

- Loosening privacy rules for substance abuse records;
- Expanding Medicaid coverage for inpatient treatment for opioid and cocaine use;
- Furthering the authority of non-physicians to prescribe buprenorphine, which is typically utilized to treat opioid-use disorder through medication-assisted treatment (MAT);
- Preventing over-prescribing of opioids through mandates related to e-prescribing and the identification of outlier prescribers;
- Promoting measures to educate Medicare beneficiaries about pain medication abuse and screen them for opioid-use disorder;
- Enhancing Medicaid coverage for foster care youth and former prisoners;
- Advancing telehealth services nationwide; and
- Encouraging non-addictive or non-opioid pain and addiction therapies, while requiring the U.S. Food and Drug Administration (FDA) to issue clarifying guidance on how such treatments can gain eligibility for expedited approval pathways.

In the Senate, lawmakers continue to craft their own opioid epidemic proposal. Senate HELP Chairman Lamar Alexander (R-TN) is leading efforts to develop this comprehensive legislative package with his Finance, Judiciary, and Commerce, Science, and Technology Committee counterparts. A recently- released draft of the legislation authorizes $500 million per year through 2021 for state opioid grants created under the *21st Century Cures Act* (H.R. 34) and includes the *STOP Act* (H.R. 1057/S. 372), which requires the U.S. Postal Service to further address shipments of fentanyl and other illicit drugs through the mail. Additionally, the package reauthorizes the White House Office of National Drug Control Policy (ONDCP) and a variety of its grant programs, as well as provides the National Institutes of Health (NIH) with broader authority to develop non-addictive pain therapies. Senate Majority Leader Mitch McConnell (R-KY) stated that the bipartisan measure will be a top priority for full chamber consideration following Labor Day.

President Trump has continued to stress that addressing the opioid epidemic is one of his Administration's top priorities. In April, U.S. Attorney General Jeff Sessions directed the DOJ's Prescription Interdiction and Litigation Task Force to examine existing state and local government lawsuits against opioid manufacturers to determine the extent to which federal law enforcement could intervene. Additionally, DOJ's National Institute of Justice announced publication of a multi-agency opioid research study that involved federal, state, and local stakeholders. Specifically, the report examines recent advancements and recognized challenges in the fight against synthetic opioids. Several months later in June, ONDCP, the Truth Initiative, and the Ad Council launched a national opioid education campaign targeted to individuals between the ages of 18 and 24 years old. The initiative, which aligns with 2017 recommendations put forth by the President's Commission on Combatting Drug Addiction and the Opioid Crisis, relies on partnerships with social media and television networks that have donated ad space.

In June, CMS issued guidance to states on ways Medicaid can treat infants born with exposure to opioids, as well as how localities can utilize enhanced federal match rates to increase the use of prescription monitoring and other health technology that combats opioid abuse. While the framework does not reveal new policies or additional federal funds, it encourages the employment of existing Medicaid tools. FDA also issued draft guidance that would further the use of MAT and broaden the definitions of effective opioid-use disorder treatments.

Additionally, in late August, FDA awarded a contract to the National Academies of Sciences, Engineering, and Medicine to establish new opioid prescribing guidelines. The forthcoming framework is expected to focus on treating acute pain, as well as provide recommendations for specific conditions and procedures. This approach is largely in contrast to the U.S. Centers for Disease Control and Prevention's 2016 opioid prescribing guidelines, which recommend using the painkillers as a last resort and encourage physicians to prescribe the lowest possible doses.

ZIKA

Legislative and administrative actions related to the Zika virus have remained limited in recent months. Citing fewer cases of the infection, FDA released guidance in early June that advises blood donation centers to take less stringent measures to ensure donations are not contaminated with Zika. Additionally, in August, NIH began its groundbreaking clinical trial of a Zika vaccine.

NUTRITION

NUTRITION POLICIES

The current farm bill – legislation supporting various farm and food programs – expires on September 30, Among other things, the farm bill provides important nutrition assistance for low-income households through the Supplemental Nutrition Assistance Program (SNAP) and the Emergency Food Assistance Program (TEFAP), which provide food products and federal support to emergency feeding organizations such as food banks and food pantries. SNAP alone accounts for approximately 80 percent of total farm bill costs.

On June 21, the House of Representatives narrowly passed its farm bill by a vote of 213-211. Most notably, the House bill would make the following modifications to SNAP:

- Require non-disabled, able-bodied adults between the ages of 18 and 59, who are not caring for young children, to work or participate in a job training program for 20 hours per week beginning in FY 2021 and gradually increasing to 25 hours per week in order to receive SNAP benefits;
- Restrict categorical eligibility for SNAP and limit who can receive benefits by virtue of participating in other low-income assistance programs. Categorical eligibility would be limited to those who receive cash assistance or ongoing or substantial services such as transportation, childcare, counseling, or other services under TANF, and whose income is less than 130 percent of the poverty line (200 percent for the elderly and disabled);
- Provide $1 billion per year, divided among states, for administering job placement and job training programs;
- Establish a database for states to ensure that participants are not receiving benefits in multiple states; and

- Modify benefit formulas to limit the availability of benefits for households that receive a nominal payment from states under the Low Income Home Energy Assistance Program (LIHEAP) to only households that include an elderly individual.

On June 28, the Senate overwhelmingly passed its bipartisan farm bill by a vote of 86-11. Unlike the House bill, the Senate bill did not include language to expand work requirements for able-bodied adults. Additionally, the Senate bill did not include language to restrict categorical eligibility for SNAP. The two legislative chambers are currently working to resolve differences between the two bills.

NUTRITION INCENTIVES

The Bipartisan Policy Center (BPC) recently convened the SNAP Task Force to explore strategies for promoting healthy nutrition through public programs and policies. In its recommendations report, BPC recommended continuing and strengthening incentives for purchasing fruits and vegetables. Included in both the House and Senate farm bills are several SNAP healthy incentives. Section 4002 of the House bill includes a retailer-funded incentives pilot through which participating retail food stores would provide bonuses to participating households based on household purchases of fruits, vegetables, and fluid milk. Section 4105 of the Senate bill includes a retail incentives provision that would allow approved retail food stores to seek waivers to offer incentives for the purchase of eligible foods, including fruit, vegetables, low-fat dairy, or whole grains, or food identified for increased consumption by the most recent Dietary Guidelines for Americans. Additionally, both the House and Senate bills would rename the current Food Insecurity Nutrition Incentive Program (FINI), which provides grants to promote consumption of fruit and vegetables by low-income people, to the "Gus Schumacher Food Insecurity Nutrition Incentive Program."

TELECOMMUNICATIONS

5G BROADBAND DEPLOYMENT – SMALL CELL SITING AND LOCAL AUTHORITY

In previous updates, we have reported on Senate Commerce Committee Chairman John Thune (R-SD) and Senator Brian Schatz's (D-HI) work to develop legislation to streamline local authority over public rights-of-way in an attempt to accelerate 5G broadband deployment. Recently, the Senators formally introduced the legislation, the *STREAMLINE Small Cell Deployment Act* (S. 3157). While containing minor revisions from the draft text released in November 2017, the bill would: (1) strip municipalities of critical tools to govern publicly owned assets; (2) categorically ban the use of moratoria; (3) impose shot-clocks under which municipalities must approve or deny small cell siting applications or risk providing "deemed granted" access to public infrastructure; and (4) restrict the amounts cities can charge providers in rents and fees to site small cells on city infrastructure. The bill would impose cost-based restrictions on the rates that can be charged for small cell access on city streetlights or other infrastructure in the public right-of-way, without requiring providers to build out unserved or underserved areas.

The legislation would have significant implications for municipal control over public assets, and, as written, could further exacerbate the digital divide. The bill has been met with significant opposition from all state and local government organizations, including the National League of Cities and the U.S. Conference of Mayors.

The Senate Commerce Committee intends to hold a hearing on the bill this fall.

WORKFORCE AND JOB TRAINING

DEPARTMENT OF LABOR OVERTIME RULE

On May 23, 2016, the Department of Labor (DOL) published a final rule updating the overtime exemption rule, which raises the minimum salary threshold required to qualify for the Fair Labor Standards Act's (FLSA) "white collar" exemption to $47,476 per year. The final rule would also raise the overtime eligibility threshold for highly compensated workers from $100,000 to $134,004. It was originally set to take effect on December 1, 2016, but a preliminary injunction was granted on November 22, 2016, by U.S. District Court Judge Amos Mazzant in the Eastern District of Texas.

On August 31, 2017, Judge Mazzant granted summary judgment against DOL in consolidated cases challenging the final rule. The court held that the final rule's salary level exceeded the Department's authority, and concluded that the Final Rule is invalid. On October 30, the Department of Justice (DOJ), on behalf of DOL, filed a notice to appeal this decision to the U.S. Court of Appeals for the Fifth Circuit. Once this appeal is docketed, DOJ will file a motion with the Fifth Circuit to hold the appeal in abeyance while DOL undertakes further rulemaking to determine what the salary level should be.

Secretary of Labor Alexander Acosta is in the process of crafting a new regulation that updates the salary level below which workers qualify for overtime pay, and has indicated that the new overtime regulations will set the new salary level somewhere between the existing threshold and the threshold set by the 2016 proposed rule. On July 26, 2017, DOL published a Request for Information (RFI), titled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." The comment period ended on September 25, 2017. In its regulatory agenda, DOL said that it expects to propose a rule in October 2018. On August 27, the DOL's Wage and Hour Division announced that it will hold listening sessions for members of the public interested in changes to the regulation. Four listening sessions will take place in various cities throughout September.