



CSAC

WASHINGTON BRIEFS

THIRD QUARTER 2016

Absent a path forward on a long-term budget for fiscal year 2017, congressional leaders devoted much of the third quarter to negotiating the terms of a stopgap spending bill. With just two days remaining prior to the October 1 start of the new fiscal year, Congress passed – and President Obama subsequently signed into law – legislation (HR 5325) that keeps the vast majority of the federal government funded at current levels through December 9th. Military and Veterans Affairs (VA) programs were the exception, receiving a full year’s worth of higher (fiscal year 2017) spending under the Continuing Resolution (CR).

The short-term CR also includes \$1.1 billion in emergency spending to combat the Zika virus, with funds being provided for mosquito control activities, vaccine and diagnostics development, and various health care functions. Funding to address the public health crisis has been a longstanding point of contention on Capitol Hill, with members spending months arguing over both the appropriate level of federal support to fight the virus and whether the dollars should be used by Planned Parenthood clinics in Puerto Rico. In the end, the final CR did not include provisions prohibiting Planned Parenthood facilities from receiving Zika-related funds.

In addition, the CR provides \$500 million in flood relief to several states, with funds being distributed through the Community Development Block Grant (CDBG) program. The bill also includes \$37 million to address the nation’s opioid epidemic. Under the legislation, dollars will be distributed for programs created by the *Comprehensive Addiction and Recovery Act* (PL 114-198), which authorizes the Departments of Justice and Health and Human Services to issue grants to states, localities, and Indian tribes for opioid abuse programs.

Notably, an eleventh-hour dispute that threatened to derail the CR was diffused when a separate deal was reached on authorizing financial aid to Flint, MI to help the community deal with its contaminated drinking water crisis. The Flint agreement was added to the House Water Resources Development Act (WRDA) reauthorization bill, which passed the lower chamber on September 28th.

Looking ahead, no decisions have been made on how to finance the federal budget beyond December 9th. While congressional appropriators have signaled their desire to package several appropriations measures into a series of spending bills that would keep government operations running through the remainder of fiscal year 2017, House conservatives may push for a shorter,

six-month bill. Such an approach, intended to keep federal spending in check, would likely be sought by conservatives if Donald Trump is elected president in November.

In other developments this past quarter, the House passed a long-awaited juvenile justice reform bill (HR 5963). The legislation, which was approved by the lower chamber on a 382-29 vote, would renew and update a number of programs that were first authorized under the *Juvenile Justice and Delinquency Prevention Act of 1974* (JJDP). Congress last passed a JJDP reauthorization measure back in 2002.

All told, HR 5963 would authorize more than \$855 million over five years for state, local and Indian tribal efforts aimed at preventing and reducing juvenile delinquency. Under the legislation, over \$387 million would be allocated for core JJDP formula grants, with more than \$467 million in funding potentially available for incentive grants and grants to support tribal programs.

The legislation also includes a number of programmatic reforms aimed at providing local governments with additional flexibility to serve at-risk youth and juvenile offenders. Among other things, the bill would restructure an existing delinquency prevention program in order to provide local governments and community-based organizations with tools to better assess and respond to unmet community needs. The measure also includes provisions designed to help youth transition out of the juvenile justice system by ensuring that they have access to education and other essential services.

It should be noted that the bill would phase out the use of Valid Court Order (VCO) exceptions (which allow judges to detain non-delinquent juveniles for committing low-level “status offenses,” such as truancy or possession of alcohol). Specifically, under the legislation, the use of VCOs would need to be eliminated by September 30, 2020, though States would be allowed to apply for an annual hardship exemption.

Across Capitol Hill, a similar juvenile justice bill is pending in the Senate. While the Judiciary Committee approved the reform measure last December, Senator Tom Cotton (R-AR) has held the legislation (S 1169) due to his concerns with provisions of the bill that would eliminate the use of VCOs.

HEALTH AND HUMAN SERVICES

Child Welfare Financing Reform

In a victory for CSAC, the *Family First Prevention Services Act of 2016* (HR 5456) did not advance in the upper chamber this past quarter. In response to concerns raised by CSAC and other key California stakeholders that the legislation would interfere with important local reform efforts already underway, Senator Barbara Boxer (D-CA) successfully prevented the child welfare reform bill from coming to the floor. Senator Boxer, along with several of her colleagues, have repeatedly insisted that the legislation be satisfactorily modified before being brought forward for a vote.

For their part, Finance Committee leaders have argued that there is not sufficient time to amend the bill in the current legislative session due to the timing of the budgetary pay-fors that are needed to provide new federal spending on adoption assistance. In an effort to appease their concerned colleagues and ultimately advance the current version of the legislation, committee leaders have offered to undertake an effort in the new Congress that would address any outstanding issues. Senator Boxer and California stakeholders rejected the offer, however, out of concern that any such future effort may not materialize.

Introduced in June, HR 5456 would provide a federal financial match for a limited set of prevention services aimed at keeping at-risk children with their families instead of placing them in foster care. The measure also would place new stringent requirements on group homes and other congregate care facilities in order to reduce their use. While the State of California and its counties support the objectives embodied in the bill – and, in fact, are operating or implementing programs designed to reduce reliance on congregate care – the legislation would either undo or severely hamper California’s work, including the launch of the Continuum of Care Reform bill (AB 403).

Looking ahead, key stakeholder organizations – including CSAC, CWDA, the California Department of Social Services and various child advocacy organizations – will continue to urge that targeted amendments be adopted as part of HR 5456. It is unclear, however, how the bill will fare during the upcoming lame-duck session.

TANF Reauthorization

The recently approved Continuing Resolution includes an extension of the Temporary Assistance for Needy Families program (TANF/CalWORKs) through December 9th. A year-end omnibus appropriations bill or similar budget package is expected to serve as the vehicle to continue TANF through September 30, 2017.

Earlier this year, the House adopted by voice vote a one-year TANF extension. The bill (HR 5170) included \$100 million in grants available to states who wish to test social impact partnerships and would create a TANF best practices clearinghouse within the Department of Health and Human Services (HHS).

The House Ways and Means Committee also approved four separate TANF-related measures, though the text of the bills was not included in the aforementioned House-approved extension. Notably, the Committee approved a bipartisan measure (HR 2990) that would create a \$100 million subsidized employment grant program for TANF recipients. Supported by CSAC and similar to the Obama administration's proposal, states would apply for demonstration grants to draw down a 50 percent wage match from the federal government for public or private employers hiring TANF recipients. Available for up to one year, the grants could support employment for a number of individuals, including youth up to age 24, non-custodial parents, and those individuals whose income is less than 200 percent of poverty.

NATIVE AMERICAN AFFAIRS

In a victory for CSAC, controversial language that would partially overturn the Supreme Court's *Carcieri v. Salazar* decision was removed this past quarter from the fiscal year 2017 Interior Appropriations bill (HR 5538). Under the language in question, tribal trust-land acquisitions made between June 18, 1934 and February 24, 2009 would be insulated from legal action challenging the Secretary of the Interior's authority to hold the land in trust. In *Carcieri*, the Supreme Court held that the Secretary is prohibited from taking land into trust on behalf of any tribe that was not "under federal jurisdiction" as of 1934.

It should be noted that the *Carcieri* rider was added to the Interior legislation by Representative Tom Cole (R-OK), who serves as the co-chair of the Congressional Native American Caucus. Congressman Cole, who also sits on the House Appropriations Committee, successfully included the partial-fix language via an amendment during the committee's consideration of HR 5538.

During House floor debate on the bill, the chairman of the Natural Resources Committee – Representative Rob Bishop (R-UT) – raised a point of order against the *Carcieri* language. Chairman Bishop's order was sustained and the language was ultimately dropped from the legislation. It should be noted that Bishop, in raising objections to the rider, indicated that the Natural Resources Committee – which has plenary jurisdiction over all Native American issues – is developing its own legislation that would address the *Carcieri* decision.

On a related matter, discussions continued this past quarter in the Senate as the chairman of the Committee on Indian Affairs, Senator John Barrasso (R-WY), attempted to advance his fee-to-trust reform bill (S 1879). Despite attempts to move the legislation forward, there was not enough support in the upper chamber for the bill to receive floor time.

Earlier this year, the panel filed its long-awaited Committee Report to S 1879. Approved last December, the legislation would overhaul the process whereby BIA takes Indian fee land into trust. Additionally, the bill would overturn the *Carcieri v. Salazar* decision.

It should be noted that S 1879 includes a series of reforms spearheaded by CSAC, including provisions that would require the BIA to provide adequate, up-front notice to counties whenever the agency receives a partial or complete application from a tribe seeking to have off-reservation fee or restricted land taken into trust. In turn, counties would be afforded an opportunity to review and comment on the application.

Furthermore, the legislation would encourage tribes that are seeking trust land to enter into cooperative agreements with counties, the terms of which could relate to mitigation, changes in land use, dispute resolution, fees, etc. In cases in which tribes and counties have not entered into mitigation agreements, the bill would require the Secretary of the Interior to consider whether off-reservation impacts have been mitigated. Many of the provisions of S 1879 closely track CSAC's own comprehensive fee-to-trust reform proposal.

During the committee's markup of the legislation, Chairman Barrasso introduced a revised version of S 1879, which included a number of revisions sought by CSAC. For example, the revised bill would provide counties with additional time to comment on trust-land applications (the original legislation included a comment period of 30 days; the substitute bill would provide for a 60-day comment period). In addition, the timeframe for the Secretary to both review an application and issue a "Determination of Mitigation" were expanded. The legislation also would further define and clarify several key terms.

Although S 1879 includes a number of key reforms to the fee-to-trust process, CSAC continues to actively seek several important modifications to the bill. Among other changes, the association is pursuing the inclusion of a change-in-use provision, as well as language that would further tighten the bill's Determination of Mitigation requirement to ensure that anticipated impacts are mitigated *prior* to land being taken into trust.

Finally, and in other developments this past quarter, the House Natural Resources Committee approved the *Tribal Recognition Act* (HR 3764). The legislation, sponsored by committee Chairman Bishop, was approved on a largely party-line vote of 23-13.

Under the bill, the power to extend federal recognition to a petitioning Indian group would shift from the Department of the Interior to Congress. While the BIA would retain certain administrative duties – including collecting and reviewing information submitted by a petitioning Indian group – it would be up to Congress to approve or deny a petitioner's request for federal acknowledgment.

As part of its responsibilities, BIA would be required to notify the governor, State attorney general, and any tribes or petitioning groups that have a potential interest in the group whenever the agency has received a letter of intent/petition. Additionally, BIA would be required to announce the opportunity for interested parties (i.e., local governments and the public) to submit factual or legal arguments in support of or in opposition to a petitioner's request for acknowledgment.

The bill also specifies criteria for a group to be considered an Indian tribe, including: that the group has been identified as an Indian entity on a continuous basis since 1900; comprises a distinct community; and, consists of individuals who descend from a historical Indian tribe. BIA would be required to publish guidelines for the preparation of petitions and provide petitioners with suggestions and advice. Under the legislation, groups could not be factions of recognized Indian tribes and could not have been denied federal recognition.

It should be noted that the legislation was introduced in response to the Obama administration's new Part 83 recognition regulations (which were finalized by the Interior Department in 2015). Chairman Bishop and others in Congress have noted that the current administrative process is without a statutory basis and have argued that tribal recognition authorities should be vested with Congress, per Article I of the Constitution. For his part, President Obama would veto the legislation if the bill were to reach his desk.

FEDERAL FOREST MANAGEMENT

During the third quarter, the Senate Committee on Agriculture narrowly advanced legislation (HR 2647) designed to improve federal forest management and address the “fire borrowing” problem. The bill, which cleared the House on a party-line vote last summer, is opposed by House Democrats and Obama administration officials due to their concerns that the environmental exemptions of the bill are too broad and that the restrictions on judicial review are too extreme.

It should be noted that the version of HR 2647 that was approved by the Senate Agriculture Committee was a substitute amendment (the text of which reflects committee Chairman Pat Roberts’ (R-KS) *Emergency Wildfire and Forest Management Act* (S 3085)). The Roberts amendment is similar to the House-passed bill in that it would increase timber production on National Forest System land by expediting the environmental review process for certain projects. Like its House counterpart, S 3085 seeks to address the rising cost of wildfire suppression by allowing access to disaster funding once 100 percent of the 10-year rolling average has been expended. In a departure from the lower chamber’s bill, however, the Roberts amendment would replace the divisive judicial review provisions with a pilot arbitration program as a way to resolve disputes around forest management projects.

While Democrats on the committee acknowledged that the Roberts amendment was a step in the right direction, they continue to have reservations with a number of the proposed streamlining provisions. Meanwhile, others on the committee – including Ranking Member Debbie Stabenow (D-MI) – believe that the bill falls short of a full wildfire funding solution. Therefore, Senator Stabenow offered her own amendment that would strike many of the streamlining provisions and incorporate the funding fix proposed in competing legislation (S 235; HR 167), which would fund 70 percent of the 10-year average through the annual appropriations process and the remaining 30 percent of fire costs through a budget cap adjustment. The Stabenow amendment was defeated by a vote of 13-9.

Meanwhile, a third proposal – the *Wildfire Budgeting, Response, and Forest Management Act* – is currently pending before the Energy and Natural Resources (ENR) Committee. The bipartisan measure is sponsored by Committee Chairwoman Lisa Murkowski (R-AK) and Ranking Member Maria Cantwell (D-WA), as well as Senators Ron Wyden (D-OR), Mike Crapo (R-ID), and Jim Risch (R-ID).

With regard to forest management, the bill would streamline the environmental review process by limiting the number of alternatives that must be analyzed for certain projects, including those that reduce hazardous fuels, install fuel and fire breaks, restore forest health, and protect municipal water supplies and wildlife habitat. The measure also would incentivize collaboration by streamlining process requirements to accelerate implementation of collaboratively developed projects. In addition, the bill would authorize \$500 million over the next seven years to provide assistance to at-risk communities to invest in proven programs that reduce wildfire risk, property loss, and suppression costs.

Additionally, the proposed legislation would allow the Forest Service and Interior Department to access disaster funding once all appropriated fire suppression funding has been exhausted. The bill would also allow the agencies to invest any excess suppression funds into fuel-reduction projects near at-risk communities, high-value watersheds, and areas with a high wildfire hazard potential.

On a related matter, a number of forestry reforms were included as part of the House-passed energy reform bill (HR 8). The Senate version (S 2012) does not include the forest management provisions. As previously reported, a bicameral conference committee is negotiating the details of the bill, and there is a possibility that some of the aforementioned policy reforms could be included in the final energy package.

With that in mind, Senators Feinstein and Steve Daines (R-MT) on October 3 sent a letter to the conference committee's lead negotiators urging them to include strong forestry reforms as part of the final energy bill. Specifically, the letter urges the committee to address the "fire borrowing" problem by enabling the Forest Service to access disaster funding to fight extraordinary wildfires. The letter also expresses support for a number of proposals that aim to increase the pace and scale of forest management.

Finally, Senator Feinstein sent correspondence this past quarter to the U.S. Department of Agriculture (USDA) regarding California's tree mortality crisis. The letter urges the Department to reprogram \$38 million in previously-appropriated wildfire prevention funds to remove dead trees in high hazard areas. Senator Feinstein also wrote to the Office of Management and Budget to urge the office to work with the Forest Service to include a specific funding request to address the crisis as part of the fiscal year 2018 budget proposal.

SECURE RURAL SCHOOLS

This past quarter, Representative Jared Huffman (D-CA) and several of his colleagues authored a bipartisan letter to House leaders in support of the Secure Rural Schools (SRS) program. Specifically, the correspondence, which was signed by 52 members of Congress, urges leaders to reauthorize SRS for fiscal year 2016 and beyond. Senators Mike Crapo (R-ID) and Jon Tester (D-MT) led a similar letter in the upper chamber, which garnered the support of 32 senators. At the request of CSAC, Senators Feinstein and Boxer both agreed to support the Crapo-Tester effort.

Earlier this year, the Forest Service released a total of \$272 million in SRS payments to more than 700 counties nationwide. In total, 39 California counties received roughly \$31.8 million, slightly more than the \$31 million that was made available in the previous year. However, the program is currently expired, and unless it is reauthorized or extended, the fiscal year 2015 allocation will represent the final SRS payment.

In the absence of such funding, the law reverts to a previous Act – the *Twenty-Five Percent Fund Act* (PL 60-136) – which is based on a revenue sharing model developed over a century ago. Pursuant to PL 60-136, the federal government would share with states 25 percent of

timber harvest receipts generated on national forests. Consequently, counties could be left with significantly less funding than in recent years.

While there are a number of bills that seek to continue the SRS payment structure, none have been able to gain much traction, which is due in large part to the inability of Congress to identify a source of funding to offset the cost of the program. For its part, the Obama administration has proposed a five-year reauthorization of SRS, although the White House, too, lacks a viable funding source. As an alternative, several measures have been introduced that would reform forest management practices in an effort to increase timber revenues.

PAYMENTS-IN-LIEU-OF-TAXES

There was an effort in both the House and Senate this past quarter to express support for the Payments-in-Lieu-of-Taxes (PILT) program. In the lower chamber, a bipartisan group of 95 lawmakers wrote to House leaders to urge them to fully fund PILT in fiscal year 2017 and beyond. Across Capitol Hill, a similar effort garnered the support of 35 senators. At the request of CSAC, a number of members of the California delegation, as well as Senators Feinstein and Boxer, agreed to sign the correspondence to congressional leaders.

Earlier this year, the Interior Department released over \$451 million in fiscal year 2016 PILT payments to approximately 1,900 local governments. In total, 57 California counties received nearly \$47.3 million, up from \$45.8 million in the previous fiscal year. As a whole, California counties have typically been the highest recipients of PILT funding. By comparison, Utah receives the next highest PILT allocation amounting to just over \$38.4 million.

Unless PILT is reauthorized or extended, this will be the last year of funding for the program. Despite the best efforts of key lawmakers to advance legislation (S 517; S 1925; HR 3257; S 2164) that would reauthorize long-term mandatory funding for PILT, such proposals have not been able to garner broad bipartisan support. Similar to the situation with legislation providing for a long-term renewal of SRS, it has been difficult for Congress to identify a viable spending offset.

In a positive development, House and Senate appropriators have agreed to include an additional year of discretionary funding (\$480 million) for PILT as part of their respective fiscal year 2017 Interior spending bills. The outcome of any future spending remains on hold, however, pending deliberations on the budget during the lame-duck session.

STATE CRIMINAL ALIEN ASSISTANCE PROGRAM

Final funding levels for the State Criminal Alien Assistance Program (SCAAP) remains unsettled pending the outcome of this year's budget deliberations. Earlier this year, the House Appropriations Committee approved its fiscal year 2017 Commerce-Justice-Science (CJS) spending legislation (HR 5393). The bill would provide \$56 billion in total discretionary funding to the Departments of Commerce and Justice, NASA, and related agencies, or \$279 million more than current spending and \$1.4 billion above the Obama administration's budget request.

With regard to funding for state and local law enforcement assistance, the House bill would provide nearly \$1.2 billion in fiscal year 2017 – a level that is roughly \$227 million below current spending. In a victory for CSAC, the bill would provide an additional \$64 million for SCAAP, bringing total program spending to \$274 million. CSAC has continued to play a lead role in working with key members of the California congressional delegation to boost SCAAP funding.

In the Senate, the Appropriations Committee-approved CJS bill (S 2837) would provide \$56.3 billion in fiscal year 2017 funding, or \$563 million more than the fiscal year 2016 enacted level. The Senate bill's proposed investment for state and local law enforcement assistance closely mirrors the House CJS bill.

Of the aforementioned total, \$100 million would be provided for SCAAP, or a proposed cut of \$110 million. It should be noted that the upper chamber typically provides limited funding for SCAAP, with senators dedicating resources to other local justice programs.

The Senate legislation also includes language directing the Department of Justice (DOJ) to ensure that SCAAP, Byrne-JAG, and COPS program applicants certify that they are in compliance with all applicable federal laws and that they will continue to remain in compliance throughout the duration of their grant award period. The language is designed to prevent so-called "sanctuary cities" from receiving federal justice grant funding in fiscal year 2017.

On a related matter, the Office of Justice Programs (OJP) released this past quarter guidance to SCAAP and JAG program grant applicants indicating that applicants who are not in compliance with a certain section of federal law will be precluded from receiving federal grant funds. The section in question (8 USC Section 1373) prohibits a local government from sending to/receiving from the federal government information regarding citizenship or immigration status. It should be noted that 8 USC Section 1373 is essentially a sanctuary city statute that has not previously been enforced by the federal government.

According to OJP, grantees will be required, beginning in fiscal year 2017, to furnish information to the agency certifying compliance with all applicable federal statutes, including 8 USC Section 1373, in order to receive SCAAP and JAG funds. It should be noted that while the section does not impose on jurisdictions an affirmative obligation to collect information from individuals regarding their immigration status, it does forbid State and local agencies from restricting the maintenance or intergovernmental exchange of such information. In California, as well as other states, certain localities have in place policies and/or practices that will likely disqualify them from receiving SCAAP and JAG funding in light of DOJ's new guidance.

It should be further noted that compliance with the requirements of California's TRUST Act (AB 4) does not appear to automatically put counties in noncompliance with Section 1373.

Finally, on the SCAAP reauthorization front, Representative Paul Gosar (R-AZ) introduced earlier this year legislation (HR 5035) that would renew the program. The bill, endorsed by CSAC, also would allow jurisdictions to be reimbursed for the costs of housing undocumented individuals who are accused of certain crimes – and not only convicted of such offenses, as is allowed for

under current law. The change would correct a long-standing flaw in federal statute that disadvantages county governments, which often spend a considerable amount of financial resources housing pretrial offenders who may not ultimately be convicted of the crimes for which they are accused.

Current law also creates a gap in reimbursement if an individual's pretrial incarceration period and subsequent conviction do not occur within the same fiscal year. HR 5035 would address these issues by ensuring that counties would be reimbursed for the costs associated with housing undocumented individuals who are accused of the crime or crimes for which they are being held.

Additionally, the bill includes language – originally drafted by CSAC during the Senate's consideration of immigration reform legislation in 2013 – that would require DOJ to compensate jurisdictions for the costs of incarcerating inmates who are determined to be of "unknown" immigration status. Unknown inmates are classified as such because they have not had prior contact with federal immigration authorities and therefore are not included in the Department of Homeland Security (DHS) database.

The intent of the language is to preclude DOJ from unilaterally instituting a policy that would eliminate payments for unknowns. DOJ attempted to implement such a policy in 2012, which would have reduced California counties' SCAAP allocations by roughly 50 percent. CSAC has argued that counties should not be financially penalized for what is ultimately the federal government's inability to verify the status of undocumented inmates. Notably, a federal review of inmate data revealed that a vast majority of inmates in county facilities who were previously categorized as "unknown" were subsequently shown to be of "known" status.

It should be noted that HR 5035 is a companion bill to legislation (S 2395) that Senators John McCain (R-AZ), Feinstein, Jeff Flake (R-AZ), and Chuck Schumer (D-NY), introduced last December.

VOCA FUNDING

The House CJS spending bill would dedicate roughly \$2.74 billion for the Victims of Crime Act (VOCA) fund in fiscal year 2017, or \$300 million below the amount that can be spent from the fund in the current year. It should be noted that the bill does not propose to transfer \$379 million from the Crime Victims Fund to the Office of Violence Against Women (OVM), as occurred in fiscal year 2016.

Across Capitol Hill, the Senate's version of the CJS appropriations bill would set the VOCA cap at \$2.95 billion, or \$85 million shy of current spending. Although the Senate legislation has a higher overall VOCA cap, the bill includes a transfer of \$379 million to the OVM, as well as a new tribal set-aside that totals \$536.85 million. As a result of these and other proposed set-asides, more funds would be available for state VOCA victim assistance grants under the House bill than the Senate legislation.

For its part, the Obama administration proposed a reduction in the amount of funds that can be made available for expenditure under the VOCA fund. The White House budget also would designate \$481 million for various programs that are not authorized under the VOCA statute and estimates \$85 million for Office of Justice Programs management and administrative costs, effectively leaving only \$1.4 billion for VOCA programs for the upcoming fiscal year.

Finally, legislation pending in the Senate (S 1495) would require that the amount made available from the VOCA fund be no less than the average amount deposited into the fund over the previous three fiscal years. The legislation, entitled the *Fairness for Crime Victims Act of 2015*, was approved by the Budget Committee and is awaiting potential floor action in the upper chamber.

REMOTE SALES TAX

During the third quarter, House Judiciary Committee Chairman Bob Goodlatte (R-VA) unveiled draft legislation that would allow states to enforce local sales and use-tax laws on remote sales. Under the proposal, entitled the *Online Sales Simplification Act (OSSA)*, remote sales would be taxable according to the tax base of the retailer's state at a rate set by the buyer's home state. For example, if an online vendor from Virginia sells a shirt to a customer in California, the vendor would use Virginia's rules for taxing clothing but would collect a tax based on a single rate established by California. Furthermore, each state would be required to adopt a single tax rate, which could be no higher than the statewide rate plus the weighted average local tax rate.

This new "hybrid" approach represents an improvement from an initial draft of the legislation, which would have required Internet vendors to collect their own home-state sales taxes and remit those proceeds to the customer's home state. Under the aforementioned example, the Virginia retailer would have been required to collect the sales tax at Virginia's rate (using that state's tax base) and remit that payment to California. This "origin-based" approach would have favored low or no-tax states at the expense of states like California, which have a higher tax rate.

There are a number of fundamental differences between OSSA and legislation endorsed by CSAC – the *Marketplace Fairness Act (MFA; S 698)* – which is currently pending in the Senate. MFA would give states the ability to collect *state and local* sales taxes from out-of-state Internet retailers based on the final destination of the purchase (and using the destination state's tax base). This proposal is the preferred alternative, as it would ensure that counties in California receive their fair share of the tax revenues.

A third proposal, sponsored by House Oversight and Government Reform Committee Chairman Jason Chaffetz (R-UT), also seeks to provide sales tax parity. Like MFA, the legislation – the *Remote Transaction Parity Act (RTPA; HR 2775)* – would establish a destination-based approach to online sales tax collection and remittance.

There are a number of key differences and similarities between the three measures. With regard to the tax collection authority, MFA and RTPA would grant sales tax collection authority

to states that are members of the Streamlined Sales and Use Tax Agreement (SSUTA). States, such as California, that do not wish to join the SSUTA could instead choose to adopt a minimum set of simplification requirements that are outlined in the legislation. OSSA, on the other hand, would require states to become a party to a new distribution agreement and participate in establishing a clearinghouse to share sales-tax revenues.

One major criticism of MFA is that it could leave small businesses vulnerable to multiple audits in every state where goods are shipped. RTPA attempts to relieve this potential burden by strengthening audit protections for small businesses. Specifically, under the Chaffetz proposal, companies that use certified software would only be subject to an audit from their home state or any state where the company has a physical presence. Furthermore, businesses with less than \$5 million in gross annual sales would be fully exempt from remote sales tax audits, unless there is a reasonable suspicion that the seller has engaged in intentional misrepresentation or fraud. Under OSSA, only the origin state may audit a seller for remote sales, although the destination state would have the ability to request information.

Both MFA and RTPA include language that would exempt small online retailers from the tax collection requirements. Specifically, MFA would exempt vendors with less than \$1 million in annual remote sales, while RTPA would gradually phase out the exemption over a period of four years. In year one, businesses with less than \$10 million in gross annual sales would be exempt. By the second year, the threshold would drop to \$5 million, and by the third year, only businesses with less than \$1 million in gross revenue would be exempt from tax collection requirements. The exemption would be completely phased out by year four. It should be noted that there would be no exemption for products sold over an electronic marketplace, such as eBay or Amazon. OSSA, on the other hand, does not include any sort of small business exemption.

In addition, both MFA and RTPA would require states to provide remote sellers with free software that is capable of determining the proper tax rate in every state and locality. RTPA would go a step further to ensure that the software is capable of electronically collecting and remitting the taxes owed. The legislation also would require states to pay for set-up, installation, and maintenance costs of such software. OSSA does not include any software provisions, as the system is theoretically designed to operate so that no such software would be required.

Each one of the three proposals has its own set of detractors, with the ensuing lack of consensus stalling efforts to advance remote sales tax legislation. For his part, Senate Majority Leader Mitch McConnell (R-KY) has pledged to hold a vote on MFA – or a similar proposal – later this year. It should be noted that the Senate in 2013 approved an earlier iteration of MFA, but the measure was never considered in the House. Therefore, the upper chamber will likely yield to the House this year.

PROPERTY ASSESSED CLEAN ENERGY PROGRAM

This past quarter, the Department of Housing and Urban Development (HUD) issued new and much anticipated guidance that will allow qualifying homes with a Property Assessed Clean Energy (PACE) assessment to be purchased or refinanced with mortgages backed by the Federal Housing Administration (FHA). FHA currently provides mortgage insurance for more than 7.6 million households nationwide. The Department of Veterans Affairs (VA) released similar guidance for VA-backed loans.

However, it should be noted that the Federal Housing Finance Agency (FHFA), which oversees Fannie Mae and Freddie Mac, does not have any immediate plans to change its position on residential PACE assessments. Since 2010, FHFA has largely thwarted residential PACE programs across the country, due in large part to the agency's view that senior liens established by PACE assessments pose risk management challenges for existing mortgage lenders.

As expected, the new guidelines will require the subordination of PACE financing to the first lien FHA/VA mortgages. For the most part, programs in California currently require PACE assessments to hold senior lien status, putting it first in line to be repaid in the event of a default. While this is the preferred option among investors, mortgage lenders have argued that this can be an impediment to the sale and refinancing of PACE-encumbered properties. Some lenders even require the lien to be paid in full prior to the sale or purchase of the property.

The dispute between investors and lenders has created some uncertainty in the PACE marketplace and has undoubtedly discouraged some homeowners from taking advantage of this innovative financing tool. However, the recent FHA guidance should help establish clarity for both borrowers and lenders, though most programs operating in California will need to make some changes to their current financing structure to take full advantage of these new guidelines.

In addition to the aforementioned PACE guidance, the Department of Energy this past quarter released a draft of its updated Best Practices Guidelines for Residential PACE Financing. DOE is also expected to provide technical assistance to support the design and implementation of effective PACE programs nationwide.

We hope this information is useful to California county officials. If you have any questions or comments, please feel free to contact us.

