



Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE **FROM:** Betsy Shotwell

SUBJECT: SEE BELOW

DATE: July 21, 2010

Approved

Date

7/21/10

SUBJECT: STATUS OF NOTABLE FEDERAL LEGISLATION RELEVANT TO LOCAL GOVERNMENT INTERESTS – JULY RECESS 2010

RECOMMENDATION

Acceptance of the attached status report from the City's Federal advocacy firm of Patton Boggs, LLP, in Washington, D.C.

OUTCOME

That the Rules and Open Government Committee and the City Council have the opportunity to review the status report by Patton Boggs staff on pending federal legislation in Washington, D.C. mid-way way through the second session of the 111th Congress in 2010.

BACKGROUND

The firm of Patton Boggs, LLP, is providing the attached update on the status and prospects of pending federal legislation of particular relevance and interest to local governments. This activity supports the City's advocacy and education in promoting our federal legislative priorities.

ANALYSIS

The attached report describes in detail the status of high-profile federal legislation of interest to the City and serves as an update to Patton Boggs' post-Memorial Day recess summary that was provided to the Council in June. The report references the status of the reauthorization of Federal Aviation Administration programs, FY 2011 and FY 2010 Appropriations, financial services overhaul and climate/energy legislation, and bills related to the original "tax extender" bill, H.R. 4213. This post-July 4 recess report details Congressional action taken on these and other items during June and anticipated before the August recess. Patton Boggs will provide a subsequent update in August on what actions took place prior to Congress adjourning for the August recess.

Rules and Open Government Committee

Re: Status of Notable Federal Legislation Relevant to Local Government Interests – July Recess 2010

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PUBLIC OUTREACH

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

By providing this document to the Rules and Open Government Committee in July, this document will be posted on the City's website with the July 28 meeting agenda and interested public will have the opportunity to review the document prior to the full Council acceptance.

COORDINATION

This memo was coordinated with the City's Washington, D.C. lobbyist firm of Patton Boggs, LLP.



BETSY SHOTWELL

Director, Intergovernmental Relations

Attachment: Patton Boggs, LLP memorandum, "Status of Notable Federal Legislation Relevant to Local Government Interests – July Recess 2010"

For more information contact: Betsy Shotwell, Director of Intergovernmental Relations at (408) 535-8270.

MEMORANDUM

To: City of San Jose
From: Patton Boggs LLP
Date: July 14, 2010
Subject: Status of Notable Federal Legislation Relevant to Local Government Interests – July Recess 2010

This memorandum provides an update on the status and prospects of pending, high-profile federal legislation with particular relevance to local governments as Congress reconvenes following the July Fourth recess for a brief session before adjourning again for the August recess. Specifically, the memo addresses –

- FY2011 Appropriations
- Restoring American Financial Stability Act of 2010 (H.R. 4173)
- American Jobs and Closing Tax Loopholes Act (H.R. 4213), providing for extension of expired tax incentives and a range of recovery-related funding assistance
- FY2010 Supplemental Appropriations (H.R. 4899) for war and disaster needs, and potential domestic programs
- Public Safety Employer-Employee Cooperation Act (H.R. 413 / S. 1611 / S. 3194)
- Small Business Lending Fund Act of 2010 (H.R. 5297)
- Federal Aviation Administration Reauthorization
- Climate / Energy legislation
- Hotel Occupancy Taxes and Online Travel Companies
- Public Safety Interoperability / D Block Spectrum Allocation

The Administration has three top priorities for enactment prior to the August recess: Financial Services Regulatory Reform (H.R. 4173), Small Business Lending (H.R. 5297), and Unemployment Insurance (H.R. 5618 / H.R. 4213). However, as noted in our post-Memorial Recess memorandum, growing public and Congressional concerns over the increasing deficit combined with moderate

Members' insistence on "pay-as-you-go" principles are impeding action on and likely will continue to stall most budget and tax legislation until after the November mid-term elections.

In addition, the Senate must complete confirmation Elena Kagan to the Supreme Court.

The passing of Senator Robert Byrd (D-WV) on June 28 further complicated Senate Democrats in securing the 60 votes required to end debate and vote on legislation. Until West Virginia Governor Joe Manchin names an interim Senator, the majority of the Senate agenda will remain stalled.

With the Senate expected to adjourn on August 6, the calendar leaves little time for legislative action.

The House is scheduled to adjourn on July 30 for a six-week recess.

FY2011 Appropriations

Prior to adjourning for the recess, six House appropriations subcommittees held markups of spending bills – Agriculture, Commerce-Justice-Science, Homeland Security, Legislative Branch, State-Foreign Operations, and Transportation-Housing. Subcommittee markups in the House will continue this week, and a few House bills may even reach full committee consideration before the August recess. In addition, three Senate subcommittees will begin efforts this week on Agriculture, Homeland Security, and Military Construction bills.

However, it remains unlikely that any appropriations bills will be completed before the November mid-term elections, with the possible exception of security-related measures such as Defense, Military Construction, or Homeland Security. We still anticipate an omnibus or minibus package of spending bills to be finished in a "lame duck" session or even in the next calendar year.

As part of its package of domestic spending amendments to the FY10 Appropriations Supplemental, the House also adopted a one-year "budget enforcement resolution" for FY11, setting \$1.121 trillion for overall discretionary funding levels in the appropriations process. This is in lieu of the typical five-year budget resolution, which has been stalled for months. Senate appropriators are expected to propose a top-line level of discretionary spending for consideration this week.

Restoring American Financial Stability Act of 2010 ("Financial Services" / "Wall Street Reform" / H.R. 4173)

In late June, the House passed financial services overhaul legislation. The bill had been stalled in the Senate, however, in recent days, Republican Senators Scott Brown (MA) and Olympia Snowe (MA) expressed their intent to vote for the bill, thus giving Democrats 60 votes. The Senate is expected to vote on the bill tomorrow and the President is expected to sign it into law later this week.

There are several provisions in the bill of relevance to local governments:

- **Neighborhood Stabilization Program Round 3 (NSP3)**: Modeled after the first round NSP formula funding to localities and States for foreclosure response (in contrast to the second round allocated competitively to non-profits), the bill provides an additional \$1 billion to help rehabilitate, redevelop, and reuse abandoned and foreclosed properties. It also includes

some retroactive flexibility fixes to meet low-income set-asides through rehab of vacant properties.

- Emergency Mortgage Relief: Building on a successful Pennsylvania program, the bill provides \$1 billion for bridge loans to qualified unemployed homeowners with reasonable prospects for reemployment to help cover mortgage payments until they are reemployed.
- Foreclosure Legal Assistance: The bill authorizes a new program administered by the U.S. Department of Housing and Urban Development (HUD) for grants to provide foreclosure legal assistance to low- and moderate-income homeowners and tenants related to home ownership preservation and home foreclosure prevention.

The bill also includes several municipal securities industry rules:

- Registers Municipal Advisors: The bill requires registration of municipal advisors and subjects them rules written by the Municipal Securities Rulemaking Board (MSRB) and enforced by the Securities Exchange Commission.
- MSRB Board Independence: The bill mandates that the MSRB must have a majority of independent members, to ensure that the public interest is better protected in the regulation of municipal securities.
- Fiduciary Duty: The bill imposes a fiduciary duty on advisors to ensure that they adhere to the highest standard of care when advising municipal issuers.

American Jobs and Closing Tax Loopholes Act ("tax extender" bill / H.R. 4213)

As previously reported, the House passed a scaled-back version of a tax extender bill on May 28. Despite the extensive concessions detailed in our last report, the final House-passed version of the bill does retain a number of high priority provisions benefitting and advocated by local governments: \$1 billion for youth summer jobs; \$2.5 billion for extension of the Temporary Assistance for Needy Families (TANF) Emergency Fund; extension of Build America Bonds (BABs); expansion of Recovery Zone Bonds; and \$1 billion for the National Housing Trust Fund.

The Senate began consideration of the revised legislation when it returned to session on June 7. An amendment offered by Finance Committee Chairman Max Baucus (D-MT) included many of the House provisions as well as \$24 billion for increased federal share of State Medicaid costs (FMAP). It also modified controversial "carried interest" tax increase provisions on venture capitalists, private equity managers, and real estate investors to appeal for Republican support, offset by raising the excise tax on oil.

Senate Republicans countered with a proposal that included some of the Democratic provisions, such as those regarding Medicare physician payments, medical malpractice reform, tax-break renewals, and unemployment benefits, but excluding the Build America Bond extension, FMAP, and other tax increases.

After weeks of debate, significant modifications and cuts to the bill, and three votes to invoke cloture, moderate and conservative Senators remained concerned over deficit increases and

Democrats were still short of the 60 votes needed to overcome a filibuster. Majority Leader Harry Reid (D-NV) pulled the bill from the floor shortly before the recess.

In response to the Senate's inability to pass a comprehensive bill, the House passed several stand-alone bills containing select provisions included in its tax extender legislation.

In late June, both the House and Senate passed the "**Affordable Health Care for America Act**" ("Medicare bill" / "doctor fix" / H.R. 3962) which reversed the 21% cut in payment rates for doctors through November 30, 2010. The measure was signed into law by President Obama on June 25.

On July 1, the House passed the "**Restoration of Emergency Unemployment Compensation Act of 2010**" (H.R. 5618 / H.R. 4213) that would extend eligibility for unemployment insurance and 100% federal funding for unemployment benefits through November 30, 2010. The provision is retroactive to June 2, 2010, when the current law expired. The Senate was unable to pass a similar bill on June 30 as it fell one vote short of the 60 needed for passage. The Senate is expected to take up the bill again after West Virginia's interim Senator is appointed.

The remainder of the tax extender bill is in limbo, and prospects for passage are low. Some provisions, such as funding for youth training and employment, are likely prospects to be carried on other bills.

FY2010 Supplemental Appropriations ("War Supplemental" / H.R. 4899)

As previously reported, the Senate passed its narrow version of the FY2010 Supplemental Appropriations Act on May 27. The Senate measure is focused solely on war funding, veterans, and disaster assistance.

House action on its more expansive version was continually delayed because of resistance to billions of additional dollars in domestic funding that House appropriators wanted to include. Finally, through a complex procedural move on July 1, the House passed a \$21 billion (fully offset) package of domestic spending amendments to the \$58.8 billion Senate-passed bill. The House also rejected three amendments aimed to reduce military presence in Afghanistan.

The Supplemental now goes back to the Senate, which the House hopes will accept the additional (but significantly reduced from earlier versions) domestic funding and offsets. The Senate adjourned prior to the House action, so it remains somewhat unclear how the package will be received in the Senate. However, all efforts to include unrelated provisions and additional domestic funding failed during Senate negotiations and debate. Moreover, the proposed House offsets would cut \$800 million in education funding over which the White House has threatened a veto. Senate Democrats will likely have to find additional offsets or reduce the domestic funding proposed by the House in order to garner enough votes to pass the bill.

Some relevant highlights of the House spending amendments most relevant to local governments include:

- Youth Jobs: \$1 billion for Workforce Investment Board youth employment programs; expanding eligible participant age to 24, extending use of funds beyond summer jobs, and continuing other flexibilities provided in ARRA.
- Education Jobs: \$10 billion Education Jobs fund to provide emergency support to local school districts to prevent layoffs and keep about 140,000 school employees on the job next year. The Department of Education will administer the fund and distribute the money to states through a formula based on total population and school age population. States will distribute the funds to school districts through their primary funding formula or through the Title I formula. The bill includes strict provisions that requires states to use this funding only to preserve, rehire or hire new employees in elementary and secondary education. However, it also requires state maintenance of effort for funding both public higher education and elementary and secondary schools in order to receive federal aid, indirectly protecting state funding levels for public colleges and universities.
- Emergency Food Assistance: \$50 million for the federal program that funds food purchase and distribution through local providers.
- Energy Technology Loans: \$180 million split equally between nuclear facility and renewable energy project loans, which will leverage \$18 billion in total investment.
- Border Security: \$701 million for enforcement on the southern border, including \$340 million for Border Patrol and Customs and Border Protection staffing, and \$50 million for local Operation Stonegarden support.
- Schools on Military Installations: \$163 million to improve capacity and condition of elementary and secondary schools on Department of Defense installations.
- Gulf Coast Oil Spill: An additional \$142 million to address issues related to the oil spill, including unemployment assistance and response activities (this is in addition to the \$162 provided in the Senate bill).
- Pell Grants: \$4.95 billion to address the current year shortfall in the Pell Grant Program.

Among other non-spending policy riders, the House also attached the pending "**Public Safety Employer-Employee Cooperation Act of 2009**" (H.R. 413/S. 1611/S. 3194).

Public Safety Employer-Employee Cooperation Act of 2009 ("Collective Bargaining for Public Safety Personnel" / H.R. 413/S. 1611/S. 3194)

As noted above the House also included a mandatory collective bargaining provision in its domestic spending amendments to the FY10 Appropriations Supplemental.

This bill requires that localities and States recognize and bargain collectively with unions representing police, firefighters, and emergency medical responders, and subject all jurisdictions to oversight by the Federal Labor Relations Authority to determine if existing laws meet minimum standards. The measure would affect approximately 20 states that do not currently allow public safety workers to join unions, and could impact existing laws in other states that do by potentially

expanding terms and conditions of employment subject to collective bargaining, such as disciplinary procedures, or changing established appeal processes. For several years, local and State governments and their associations have opposed the bill, but with advocacy from labor and first responders, the provision has significant bipartisan support. Senate opponents previously raised procedural challenges to halt passage, asserting that the bill first should be considered in committee; however, those defensive points of order will not apply to the provisions included in this bill.

Small Business Lending Fund Act of 2010 (H.R. 5297)

On June 17 the House passed legislation that would create a \$30 billion lending fund intended to help small banks expand credit availability to small businesses. The program is designed to increase small business hiring which has markedly decreased due to tightened lending standards instituted as a result of the 2008 financial crisis.

The House bill also would establish a \$2 billion state small business credit initiative to aid state and local programs that provide small businesses access to capital; a \$1 billion Small Business Administration program to help develop small businesses; and a \$300 million borrower assistance program to help small businesses experiencing difficulty in paying loans. The cost of the bill is offset by tax incentives. Funds would be administered by the Treasury Department, which would be required to certify its decisions are based on economic fundamentals and merits.

The Senate picked up a substitute amendment to the House bill just prior to adjourning for the July Fourth recess. The Senate bill differs from the House bill primarily with regard to tax provisions. The Senate bill also includes an extension of the expired "bonus depreciation" provision that enabled small businesses to write off 50% of equipment and machinery assets in an expedited manner (up to a certain funding level). It's also likely the Senate bill will address small business government contracts.

In an effort to prevent a controversial amendment to reauthorize the estate tax, Majority Leader Reid undertook a procedural move to preclude other Senators from proposing amendments.

Senate action was delayed due to events honoring Senator Byrd. The bill is the first item on the Senate's post-recess agenda and is expected to pass with bipartisan support.

Federal Aviation Administration Reauthorization

With the fourteenth extension of Federal Aviation Administration programs enacted last week, the next target date for the House and Senate to reach an agreement has moved to August 1, which is also about the time Congress is expected to recess for the rest of the summer. While there are some signs of progress -- Senate leadership has pledged to provide floor time in July, and discussions on a handful of contentious issues have now been elevated from the staff to Member level -- there is no indication yet that an agreement is close.

As previously reported, of primary interest for local governments and airport sponsors among the problematic issues is increasing and indexing the maximum Passenger Facility Charge (PFC) to help raise revenues for airport improvements. The House bill would increase the PFC from \$4.50 to \$7.00, but the Senate bill does not include any across-the-board PFC adjustment. According to a report last week, the Senate is prepared to accept an increase to \$5.50. So, while some increase is

virtually certain, the level and potential for indexing remains unclear. Another debate relevant to localities is over a House provision that would require the FAA to adopt a rule raising standards for Aircraft Rescue and Fire Fighting (ARFF) equipment and response time, supported by firefighters but deemed extremely costly and functionally unnecessary by airport operators.

Overall, a more intractable impediment to final resolution is the very strong threat of a Senate filibuster over a House provision that would place FedEx ground workers under the National Labor Relations Act, equivalent to treatment of UPS, thereby making it easier for unions to organize. This provision has now attracted a great deal of attention as both the mainstream as well as trade media have identified this provision as the most contentious of all. Senate leaders have hinted that an FAA reauthorization bill will not be enacted unless this provision is removed, but House Committee leaders show no signs yet of backing down. Other provisions in the House bill generating Senate resistance include a sunset of antitrust immunity granted to international code sharing agreements that would require airlines to resubmit applications subject perhaps to a different standard of review; and the relative stringency of requirements for enhanced inspection of foreign repair stations.

Finally, the House bill would add ten additional beyond-the-perimeter slots at Reagan National Airport, withdrawing ten inside-the-perimeter slots at non-peak hours. While the Senate bill does not include any similar provision, several amendments to increase beyond-the-perimeter slots were filed on the Senate floor. In negotiations with the House, Senate Committee leaders recently have proposed adding 48 new beyond-the-perimeter slots, with 10 of these to be reserved for low-cost carriers, and 48 inside-the-perimeter slots to be withdrawn or traded, resulting in no net additional operations. Thus, some additional beyond-the-perimeter flights are likely to be included in the final compromise.

Climate / Energy Legislation

In June, a much-anticipated vote was held on Senate Energy and Natural Resources Committee Ranking Member Lisa Murkowski (R-AK)'s "disapproval resolution" to stop the Environmental Protection Agency's "endangerment finding" that serves as the foundation for its work to regulate greenhouse gas emissions under the Clean Air Act. It failed by a vote of 53-47; however, the vote count showed that 6 Democrats joined every Republican to reaffirm our assessment that the Senate is very much short of the 60 votes needed in favor of passing climate change legislation.

House Speaker Nancy Pelosi (D-CA) and Senate Majority Leader Reid subsequently met with their jurisdictional committee chairs and directed them to recommend proposed energy legislation that could be considered this month. Since the House already has passed a comprehensive climate change/energy bill, the Speaker is likely focused on a bill that would more narrowly respond to the Deepwater Horizon catastrophe in the Gulf of Mexico. The Senate Energy and Natural Resources Committee favorably reported offshore oil and gas development reform legislation earlier this month; the House had previously approved stand-alone legislation to give the President's oil spill commission subpoena power in conducting its 6-month review of the BP oil spill.

We do not anticipate that Senators Kerry and Lieberman will be successful in moving their climate change legislation this year, especially in an increasingly partisan Senate in an election year.

Moreover, they have yet to develop broad support among Democrats who are strong supporters of climate change legislation. Furthermore, moderate Democrats from coal states and Rust Belt states have withheld support for a broader climate bill and with very few, if any, Republicans willing to support the bill, it is inconceivable how Senate Democratic leadership could find 60 votes to move the bill forward. Fundamentally, and as Senator Dianne Feinstein (D-CA), recently said, “[t]he climate bill isn’t going to stop the oil leak.”

As made clear by the President, he nonetheless wants to try. Administration officials earlier advised the Senate Democratic leadership that they wanted to see a bill on the floor by the week of July 12, to be followed with a debate and vote on the President’s Supreme Court nomination. That has not yet happened. As relayed earlier, the collapse of the Kerry-Graham-Lieberman tri-partisan collaboration, agreement among some key Congressional Chairmen to delay EPA action to regulate emissions, and Senate calendar constraints reaffirm that the more likely prospect for completion this year is a more narrow “energy-only” measure dealing primarily with offshore drilling issues and possibly also incentivizing increased clean energy production.

Hotel Occupancy Taxes and Online Travel Companies

An ad hoc coalition of interests continued to defend against renewed legislative efforts that would exempt online travel companies (OTCs) from a portion of local and state hotel taxes, and potentially trump pending adjudication on back taxes. Fundamentally, the proposal would prohibit local governments from collecting tax on the difference between the retail price that an online travel company charges to a customer using the hotel in the city, and the wholesale price that the hotel charges to the online travel company.

The issue has been pursued through different legislative vehicles in the Senate for the past three years. The most recent target was as an amendment to the pending small business bill, until the Majority Leader’s procedural maneuver to limit amendments more generally appeared to preclude consideration.

While it seems the OTC effort was staved off from the small business bill, there are still some mechanisms by which it still might be raised and there will certainly be efforts to include it in future legislation.

Public Safety Interoperability / D Block Spectrum Allocation

Conflicts continue over competing approaches to enable buildout and operation of a national public safety interoperable broadband network, and relationship to allocation of the 700 megahertz band “D Block” spectrum. Action in June included a committee hearing on a bipartisan draft House bill and launch of a new telecom industry-financed public safety coalition media campaign. In response to Federal Communications Commission (FCC) policy proposals in the recent National Broadband Plan release, the issue has received dramatically increased attention since we first engaged on the topic for public safety interests about a year ago.

Differences remain centered on a range of funding and technical issues on how to resolve lack of progress toward implementing interoperable public safety communications nationwide. For more

than a year, eight major public safety associations have advocated for reallocation of the D Block directly to public safety control without the statutorily-mandated commercial auction process, following failure of a prior auction attempt that would have required the winner to use that spectrum in partnership with public safety. In March, the FCC released a contrary proposal to reauction the spectrum to commercial providers, and substitute D Block interface requirements and priority roaming access for public safety across commercial networks to ensure capacity when needed for emergencies. The FCC contends that first responders have sufficient spectrum to fulfill non-emergency needs and the real demand is financing system buildout in both urban and rural areas, while public safety argues unique capabilities will not be addressed unless it controls and leverages the spectrum.

Two similarly competing House bills have emerged from this debate. In April, House Homeland Security Committee Ranking Member Peter King (R-NY) introduced the bipartisan "Broadband for First Responders Act of 2010" (H.R. 5081), allocating the D Block to public safety but not providing funding for construction or operations, and not identifying offsets for the cost of transfer. In June, House Energy & Commerce Committee Chairman Henry Waxman (D-CA) and Subcommittee Chair Rick Boucher (D-VA), with support from their Ranking Members, circulated and held a hearing on a draft alternative "Public Safety Broadband Act of 2010" that resembles the FCC proposal, proposing to auction the D Block imposing various first responder coordination requirements for the purchaser, and create a funding mechanism through spectrum proceeds to finance buildout.

The vast majority of the public safety community supports the direct D Block reallocation over the FCC auction alternative, with the Fraternal Order of Police the primary exception. In addition, the major local and state government associations endorse that approach, although noting the need to address funding as well. The telecommunications industry is more divided, generally between providers that want access to the new spectrum and others that already have enough or sell equipment to public safety.

With apparent bipartisan leadership support for the auction approach within the committee of jurisdiction, several challenges confront first responders in seeking the D Block reallocation. First, public safety must establish the business case for the ability to finance rapid comprehensive nationwide buildout without an auction by leveraging the spectrum asset, or finding another funding source such as a nationwide user fee or loan fund. Second, public safety must counter the FCC analysis and establish the technical merits of need for the spectrum, which Motorola has begun to present with assessments of interference, technologies, and capacity.

Given the dramatically divergent views, multi-billion dollar costs, and need for Senate consideration, enacting legislation before the next session of Congress is unlikely. However, we believe significant progress can be made toward a compromise House position as the basis for final legislation in the near term.