

# Holland & Knight

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DATE: December 6, 2018  
TO: City of Seattle  
FROM: Holland & Knight LLP  
RE: December 2018 Federal Update

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This memo provides an overview of key federal issues important to the City of Seattle, including FY 2019 appropriations, the 116<sup>th</sup> Congress, the 2020 Census, Byrne-JAG grants, immigration, the FCC's 5G order, Opportunity Zones guidance, and proposed changes to Title IX.

## I. FY 2019 Appropriations

Prior to the November elections, Congress reached a deal to fund the government through December 7. Congress had previously passed two minibus FY 2019 appropriations packages, and the remaining agencies were funded through a continuing resolution (CR). The two packages were:

- [H.R. 6157](#) – Energy-Water; Legislative Branch; Military Construction-Veterans Affairs (VA)  
*Signed into law on September 21*
- [H.R. 5895](#) – Defense; Labor-Health and Human Services (HHS)-Education  
*Signed into law on September 28*

On December 6, Congress passed another CR that would fund the remaining agencies through December 21, and President Trump signed the measure. The short-term CR extends funding for Agriculture; Commerce-Justice-Science (CJS); Financial Services; Homeland Security; Interior-Environment; State-Foreign Operations; and Transportation-Housing and Urban Development (THUD). The two-week CR also extends authorization for funding for the Violence Against Women Act (VAWA), Temporary Assistance for Needy Families (TANF), and the National Flood Insurance Program (NFIP). The remaining FY 19 appropriations package includes funding for many key priorities, including:

- **2020 Census:** If Congress can clear new funding levels, the Census Bureau would receive a \$2 billion increase, amounting to a more than 70 percent funding bump, leading up to the 2020 survey.
- **Housing:** An extra \$455 million would be spent on housing programs under the FY 2019 pending levels, including Section 8 and public and Indian housing, bringing program totals up to nearly \$31 billion.
- **VAWA:** An extra \$1 million would be appropriated to the Office of Violence Against Women, for a funding total of \$493 million.

The most significant issue holding up the remaining appropriations funding package is the President's request for at least \$5 billion for a border wall in the Homeland Security spending bill. The House Homeland Security appropriations bill includes \$5 billion for the wall, while the Senate has a bipartisan agreement to provide \$1.6 billion for border security enhancements. President Trump has said he would be willing to support a partial government shutdown if Congress does not provide the funding he requested in a spending bill. If disagreements over the border wall cannot be resolved, members from both parties have acknowledged that a longer-term CR could follow, possibly even extending to September 30, 2019.

President Trump, Speaker-elect Pelosi, and Minority Leader Schumer are slated to meet on December 11 to continue negotiations.

## **II. Democratic Leadership and Priorities: 116<sup>th</sup> Congress**

The midterm elections on November 6 split control of the House and Senate for the 116<sup>th</sup> Congress. For the first time in eight years, Democrats will control the House, while Republicans will continue their leadership in the Senate. Democrats gained more than the 23 seats needed to win the House majority, and flipped several seats in Republican-held districts. In the Senate, Republicans expanded their majority, retaining their majority in the chamber. The House will be comprised of 235 Democrats and 198 Republicans, with two races yet to be called. In the Senate, Republicans will have 53 seats, and Democrats will hold 47 seats.

On November 28, House Democrats overwhelmingly voted Rep. Nancy Pelosi (D-CA) as their nominee for Speaker of the House in the 116<sup>th</sup> Congress. She was nominated in a closed door meeting in a 203-32 vote. A small group of progressive Democrats have opposed her run, citing a desire for new leadership. Democrats also voted for Rep. Steny Hoyer (D-MD) to serve as Majority Leader and for Rep. James Clyburn (D-SC) to serve as Majority Whip. Rep. Hakeem Jeffries (D-NY) was elected to serve as Democratic Caucus Chair. On the Republican side, Rep. Kevin McCarthy (R-CA) will serve as Minority Leader in the new Congress, and current Majority Whip Steve Scalise (R-LA) will serve as Minority Whip.

Democrats have outlined their top priorities for the opening weeks of the 116<sup>th</sup> Congress. These include: 1) campaign finance reform/ethics package (will be the first bill on the House floor); 2) prescription drug pricing control; 3) DACA; 4) Equality Act; and 5) gun safety. In addition, Democrats are also expected to open investigations into Trump Administration officials and to use their oversight authority to examine the Administration's actions. House Oversight Committee Democrats have already submitted several subpoena requests, including into the Department of Justice's (DOJ) refusal to defend the Affordable Care Act (ACA) in court, the President's travel ban, and the 2020 Census citizenship question. Further, Democrats will likely use oversight capabilities to investigate industries such as financial services, technology companies, and drug manufacturers.

In the Senate, where Republicans expanded their majority, Majority Leader Mitch McConnell (R-KY) and Minority Leader Chuck Schumer (D-NY) will retain their current positions in the 116<sup>th</sup> Congress. Sen. John Cornyn (R-TX) will leave his position as Majority Whip, based on Senate GOP rules that impose a three-term limit on most top leadership positions. His successor

will be Sen. John Thune (R-SD), who served as GOP Conference Chairman in the 115<sup>th</sup> Congress.

Democratic leadership will remain the same as in the 116<sup>th</sup> Congress, with Sen. Dick Durbin (D-IL) continuing in his role as Minority Whip and Sen. Patty Murray (D-WAS) as Assistant Democratic Leader.

### **III. Census 2020**

With a Democratic majority in the House of Representatives for the 116<sup>th</sup> Congress, it is anticipated that the addition of a citizenship question to the 2020 Census will be an issue in several committees and subcommittees with jurisdiction over the Census. The Congressional Tri-Caucus – composed of the Congressional Hispanic Caucus (CHC), Congressional Black Caucus (CBC), and Congressional Asian Pacific American Caucus (CAPAC) – has worked to oppose the Administration’s move to add a citizenship question. House Democrats have also said that they expect the House Oversight Committee will probe the question further. In October, Rep. Elijah Cummings (D-MD) – who will chair the committee – had questioned the Commerce Department’s inclusion of the citizenship question.

In closing arguments in the trial challenging the Trump Administration’s decision to add the question of citizenship to the 2020 census, plaintiffs’ attorneys alleged that the Secretary of Commerce had acted above the law when it was added to the Census. The plaintiffs, a coalition of several dozen states, cities and civic organizations, argue that the question should be removed because it will lead to a significant undercount and cheat localities out of funding and representation. The government says that having more granular ‘block-level’ data would help it enforce the Voting Rights Act. The judge in the case, U.S. District Judge Jesse M. Furman, has said he expects to issue a ruling within weeks.

### **IV. Byrne-JAG Grants**

FY 2017 Edward Byrne Memorial Justice Assistance Grant (Byrne-JAG) grant awards were announced in October. Several cities had filed motions against federal government proposals to withhold grant funding from local governments that did not comply with federal immigration authorities, also known as sanctuary cities. Judge Edgardo Ramos, of the US District Court in Manhattan, issued a permanent injunction on December 3 that blocked the DOJ from enforcing three immigration-related conditions on grants distributed in eight jurisdictions. The order impacts New York City, and the states of New York, New Jersey, Connecticut, Virginia, Washington, Rhode Island and Massachusetts. The three conditions were:

- **Notice:** Requires grantees to give advance notice to the Department of Homeland Security (DHS) of the scheduled release dates and times of undocumented immigrants in state or local correctional facilities.
- **Access:** Required grantees to give federal immigration agents access to undocumented immigrants in state or local correctional facilities to question them regarding their immigration status.

- **Compliance:** Required grantees to certify compliance with 8 USC § 1373, which prevents states and local governments from restricting communication with federal immigration authorities regarding an individual’s citizenship or immigration status.

The court instructed the DOJ to reissue the states’ FY 2017 Byrne-JAG award documents, without the three conditions imposed, and to distribute those awards as they ordinarily would, without the conditions.

## **V. Immigration - Public Charge**

The DHS announced the release of the Administration’s proposal to significantly broaden the definition of what constitutes a “public charge,” a shift in the nation’s immigration policies. The Notice of Proposed Rulemaking (NPRM) was published in the Federal Register on October 10, and the comment period will close on December 10.

Part of federal immigration law for more than 100 years, the “public charge” test is intended to identify people who may depend on the government as their main source of support. If the government determines that a person is likely to become a “public charge,” it can deny a person admission to the U.S. or lawful permanent residence (“green card”) status. Currently the only benefits considered in determining who is likely to become a “public charge” are cash assistance, such as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and government-funded institutional long-term care.

The Administration’s proposal would broadly expand the kinds of public assistance counted when making a “public charge” determination. Benefits that could be considered in a “public charge” determination include key health care, nutrition, and housing programs that help participants meet their basic needs, such as:

- Non-emergency Medicaid (with limited exceptions for certain disability services related to education);
- The low-income subsidy for prescription drug costs under Medicare Part D;
- Supplemental Nutrition Assistance Program (SNAP); and
- Housing assistance such as public housing and Section 8 housing vouchers.

The proposed regulation also favors immigrants with higher incomes, increasing the income level for applicants who hope to overcome the “public charge” test. A family of four earning under \$31,000 annually (125 percent of the federal poverty line) would be weighed negatively. A family of four earning over \$63,000 annually (250 percent of the federal poverty line) would be weighed positively and may be able to overcome other negative factors.

Mayor Durkan has submitted comments individually and jointly with the U.S. Conference of Mayors. A final rule is expected in early February and lawsuits will be filed shortly thereafter.

## **VI. FCC 5G Order**

On September 26, the Federal Communications Commission (FCC) approved sweeping regulations for 5G wireless infrastructure, significantly curtailing the authority of states and localities. The industry-supported ruling includes several preemption provisions purportedly aimed at accelerating deployment of 5G networks. The new FCC 5G order passed with support from all four FCC commissioners, though the sole Democrat, Jessica Rosenworcel, dissented in part due to concerns about overriding state and local authority.

The new regulations will establish “shot clock” time limits for jurisdictions to process applications for mounting small cells on public infrastructure. Installations on existing infrastructure must be processed within 60 days, while requests to build new structures need to be processed within 90 days. Failing to act within the specified time limits constitutes a presumptive prohibition of services, giving companies further ammunition to take governments to court. The approach has been widely criticized by cities and local governments, as many local governments lack the resources to process these applications within the new, tighter deadlines and would need to hire additional staff. By curtailing the time cities have to review deployment requests, cities will also have limited ability to account for issues such as whether the installation is occurring at a historical landmark. Further, under the FCC ruling, batch applications of multiple requests for the same type of facilities filed simultaneously are subject to the same deadlines. This could pose additional challenges. For instance, some companies seek to affix old, bulky equipment to poles, potentially leading to safety concerns or violations of the Americans with Disabilities Act if they obstruct sidewalks.

The FCC order also effectively limits what local governments can charge – \$500 for an initial application fee covering up to five small cells and \$270 for an annual right-of-way access fee per small cell – both considerably lower than what cities have typically charged. Localities could still levy higher fees, but if a wireless provider sued, local officials would need to demonstrate the fees are a “reasonable approximation” of costs incurred. In larger jurisdictions where fees are higher, the FCC ruling could amount to seven-figure losses in unrealized revenues.

The ruling also limits allowable local aesthetic requirements, including minimum spacing requirements, to those that are: “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments and (3) published in advance.” The FCC notes that undergrounding requirements for wireless facilities would constitute an illegal prohibition of service by a local government. The FCC order excludes small cell sites from being reviewed for environmental impacts, and impacts on historical character of an area. The order also prevents cities from charging any fees to file deployment applications beyond what it actually costs to review them.

## **VII. Opportunity Zones**

The Treasury Department and the Internal Revenue Service (IRS) [released](#) long-awaited proposed regulations and guidance for the Opportunity Zone tax incentive on October 19. Opportunity Zones were created through the Tax Cuts and Jobs Act in 2017, and are Census-designated tracts designed to encourage private investment in economically distressed communities by creating new tax benefits. In June, 8,761 communities were designated as qualified Opportunity Zones, a designation they will hold for 10 years.

Under the program, investors can defer tax on almost any capital gain until December 31, 2026, by making an investment in an opportunity zone, making an election after December 31, 2017, and meeting other requirements outlined by the guidance. In order to qualify for deferral, the amount of a capital gain to be deferred must be invested in a Qualified Opportunity Fund (QOF), which must be an entity treated as a partnership or corporation for Federal tax purposes and organized in any of the 50 states, D.C. or five U.S. territories for the purpose of investing in qualified opportunity zone property. The QOF must hold at least 90 percent of its assets in qualified Opportunity Zone property (investment standard). The [Notice of Proposed Rulemaking \(NPRM\)](#) released on October 19 has a 60-day turnaround time, and addresses ten areas of guidance. Specifically, the regulations address the type of gains that may be deferred by investors, the time by which corresponding amounts must be invested in QOFs, and the manner in which investors may elect to defer specified gains. The guidance also contains proposed regulations applicable to QOFs, including rules for self-certification, valuation of QOF assets, and guidance on qualified opportunity zone businesses. The Treasury and IRS also issued a [Revenue Ruling](#) to provide guidance for taxpayers on the original use requirement for land purchased after 2017 in qualified opportunity zones. The IRS will provide Form 8996, which investment vehicles can use to certify as QOFs.

Following the release of the guidance, states with designated Opportunity Zones have begun holding informational sessions to educate communities on how best to leverage the new tool. The IRS and the Treasury Department are soliciting comments on the Proposed Regulations, including aspects relating to "original use" and "substantial improvement." The Treasury Department and the IRS are also working on additional proposed regulations expected to be released at the beginning of next year.

### **VIII. Proposed Title IX Changes**

Secretary of Education Betsy DeVos recently released a sweeping overhaul of how colleges and universities must handle allegations of sexual assault and harassment, giving new rights to the accused, including the ability to cross-examine their accusers. A law from 1972, Title IX bars sex discrimination at schools that receive federal funding. Most of the focus is on higher education, but the rules also apply to elementary and secondary schools.

One of the most consequential provisions is the standard of proof required in assessing claims. Under the DeVos proposal, schools will be allowed to choose between "preponderance of the evidence" and the higher bar of "clear and convincing" evidence. The guidelines issued by the Obama Administration had directed schools to use the "preponderance of the evidence" standard. The regulation would also require schools to use the same standard in these cases as they use for other complaints, including those against employees and faculty. Another major change from the 2011 Obama administration guidelines are new rules that more narrowly define sexual harassment. It must be "unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity." Under Obama-era regulations, harassment was "unwelcome conduct of a sexual nature."

The proposed rule changes have been published in the Federal Register, and the proposal is open for public comment until January 28, 2019 before being finalized.

