

# THE MONTH IN WASHINGTON

A Federal Report Provided by LGV&A

## SEPTEMBER 2013

Since lawmakers have not passed appropriations bills this year, many government operations were left without funding when fiscal year 2013 ended at 12 midnight on October 1, meaning non-essential federal employees were furloughed until Congress passes and President Obama signs legislation that provides money for them. The Republican-controlled House is trying to use the spending bill to try to defund or, at least, delay implementation of the 2010 Patient Protection and Affordable Care Act. The Democrat-controlled Senate has refused to go along with those efforts, and President Obama has, in any case, promised to veto any bill that undoes his signature domestic achievement. As of early October, no middle ground was in sight.

## ISSUES AND EVENTS

### **Pew Partnering with Conservatives to Attack Public Pensions: Report**

The Pew Charitable Trusts is working with a conservative organization to reduce pension benefits for public employees, a report released on September 26 by a progressive think tank has concluded.

Pew has worked with the John Arnold Foundation since 2011, according to the "Plot Against Pensions" report, on "a campaign to reduce guaranteed retirement income for pensioners. As *Marketwatch* reported in 2013, Pew and Arnold are 'advocat(ing) for cash balance plans.' They are advocating for 401(k)-style defined contribution plans as well."

"These pension-slashing initiatives are part of a larger movement that aims to reduce or eliminate guaranteed retirement income for public workers," the report stated. "Leading this movement under the euphemistic guise of 'reform,' Pew's Public Sector Retirement Systems Project and the Arnold Foundation are trying to distract attention from what McClatchy Newspapers documented: namely, that 'there's simply no evidence that state pensions are the current burden to public finances that their critics claim.'"

The report cited Detroit's bankruptcy crisis as a case in which public pensions have been blamed for a municipality's financial problems when "both Detroit and the state of

Michigan have for years been spending hundreds of millions of dollars on wasteful corporate subsidies.”

While Pew is often regarded as non-partisan and non-ideological, the report asserts that it is “well-rooted in conservative movement history [and] still tied to that movement’s political institutions.” The report links the Pew-Arnold efforts to a broader conservative agenda that is focused on reducing public employee pensions.

“Conservative activists are manufacturing the perception of a public pension crisis in order to both slash modest retiree benefits and preserve expensive corporate subsidies and tax breaks,” the report stated. “States and cities have for years been failing to fully fund their annual pension obligations. They have used funds that were supposed to go to pensions to instead finance expensive tax cuts and corporate subsidies. That has helped create a real but manageable pension shortfall. Yet, instead of citing such a shortfall as reason to end expensive tax cuts and subsidies, conservative activists and lawmakers are citing it as a reason to slash retiree benefits.”

Greg Mennis, the project director for Pew’s work on pensions, defended the organization’s work in a Q&A released by Pew by saying that, “if changes are not made, retirees, workers and taxpayers will be left with rising costs and unpaid promises for years to come.”

“The most important task facing states and cities is to pay down their existing pension debt in order to keep the promises already made to retirees and workers,” Mennis said. “This will require years of fiscal discipline and may involve raising revenue, cutting spending or asking employees to contribute more. Some stakeholders will want to solve the pension shortfall only with tax increases. Others will want to solve it only with spending cuts. Each state and city will address the issue differently, and we know there is no one-size-fits-all solution.”

Mennis said that the organization has partnered with the Arnold Foundation because the groups “share the goal to help states design and adopt retirement systems that are fair, affordable and fiscally sustainable, while at the same time preserving governments’ ability to recruit and retain a talented public-sector workforce.”

The report was released on the same day that *Rolling Stone* published an article on “Looting the Pension Funds,” which charges that conservatives are “using scare tactics and lavishly funded PR campaigns to cast teachers, firefighters and cops – not bankers – as the budget-devouring boogymen responsible for the mounting fiscal problems of America’s states and cities.”

### **SEC Proposes Rule on CEO Pay Disclosure**

The Securities and Exchange Commission on September 18 issued a proposed rule that would require publicly-held companies to disclose the ratio of CEO pay to the median of workers’ pay.

The rule, which is required by the 2010 Dodd-Frank Act, does not include a specific methodology but, instead, allows “companies significant flexibility in complying with the disclosure requirement while still fulfilling the statutory mandate,” SEC Chair Mary Jo White said.

A company’s particular methodology could include using a statistically significant sampling of employees to calculate the median pay of rank-and-file workers, which may address some objections by large multi-national companies that it would be difficult and expensive for them to gather pay data on all of their employees. Such companies were unsuccessful, however, in convincing the SEC to allow them to use only U.S. workers in their calculations.

The SEC approved the proposal by a 3-2 vote, with the commission’s Democratic members outvoting their Republican colleagues. While Democrat Luis Aguilar said that the rule would provide “a valuable new perspective for executive compensation decisions,” Republican Michael Piwowar said that it would “unambiguously harm investors.”

The U.S. Chamber of Commerce, which has been one of the leading opponents of the CEO pay rule, called the proposal “another example of special interests promoting policies contrary to the interests of investors and the businesses they invest in.

“Pay ratios will not give any insight on the performance of a company or its management and fail to give investors decision-useful information or assist with capital formation,” said David Hirschmann, president and CEO of the chamber’s Center for Capital Markets Competitiveness. “This proposal has the potential to drive up compliance burdens and costs for public companies with no benefit to investors – a formula that continues to make it less attractive to be a public company in the United States.”

CalPERS CEO Anne Stausboll, though, said that the rule “further opens the window on CEO pay and will help shareholders to keep management accountable.”

“Companies should welcome the new opportunity to articulate their approach to value creation through the transparency of their compensation practices across their workforce,” Stausboll said. “That is good for business and good for shareholders.”

The House Financial Services Committee in June advanced the “Burdensome Data Collection Relief Act” (H.R. 1135), which would repeal the pay disclosure requirement. In a statement submitted to the committee in May, CalPERS, while acknowledging that the provision as written is “inartful” and possibly should be amended, nonetheless asserted that “we strongly support the spirit of the disclosure and believe that the SEC has the flexibility to provide companies with guidance on how to comply with this section.”

Public comments will be accepted on the proposal for two months.

## **SEC to Continue to Examine Public Pensions**

Issues related to public pensions will continue to be “a continuing and very significant theme of the SEC,” a Securities and Exchange Commission official said on September 26.

The SEC has become more active on public pension topics recently, with the Municipal Securities and Public Pensions Unit bringing its first-ever actions against states this year, when New Jersey and Illinois were charged with misleading bond investors about the funding of their public employee pensions.

“I can’t overemphasize the significance and at least the need to focus on pension liabilities because of the sheer magnitude of the numbers,” John Cross, head of that unit, said at the National Association of Bond Lawyers annual workshop.

Cross also discussed the SEC’s new rule on municipal advisor registration.

## **Administration: Participants in Multi-Employer Health Plans Not Eligible for Subsidies**

The Obama administration has reiterated that participants in multi-employer health plans will not be eligible for federal subsidies.

Union officials have criticized the administration for interpreting the 2010 Patient Protection and Affordable Care Act (PPACA) in such a way that multi-employer health plans do not meet the law’s definition of a “qualified health plan.” As a result of this interpretation, participants will not be eligible for tax credits that are to begin in 2014. This, union officials say, could negatively affect the 6.2 million people in Taft-Hartley plans, since it could encourage plan sponsors to drop coverage, leaving people to buy insurance through the insurance exchanges that are to be launched on January 1.

There had been reports that the administration was looking to address this, prompting House Ways and Means Committee Chairman Dave Camp, R-Mich., and Senate Finance Committee Ranking Republican Orrin Hatch of Utah to write to Treasury Secretary Jacob Lew on September 10 to object to any changes, noting that, “The exchange subsidies under PPACA were based on and designed specifically to ensure the principle that no individual may receive both the longstanding health insurance tax exclusion and the PPACA exchange subsidies. Giving union workers exchange subsidies in addition to the income tax exclusion would be ‘double-dipping.’”

Treasury’s Assistant Secretary for Legislative Affairs Alastair Fitzpayne expressed agreement with that interpretation in a September 13 letter to Hatch that stated that “an individual who is covered by an eligible employer-sponsored plan would not be eligible to receive a premium tax credit.”

“The conclusion that an individual cannot benefit from both the exclusion from taxable income for employer-provided health coverage under such a plan and the premium tax

credit provided by [the health care reform law] applies whether the individual is covered by a single-employer plan or a multiemployer plan,” Fitzpayne wrote.

Hatch and 20 other GOP senators, though, were not completely satisfied with Treasury’s response, and they wrote to Office of Management and Budget (OMB) Director Sylvia Burwell on September 18 to “urge that you not authorize the release of any regulations that will create a special carve out which benefits union workers at taxpayers’ expense.”

“We appreciate the September 13, 2013, letter from the Department of the Treasury to U.S. Senator Orrin G. Hatch which says President Obama will follow the law and not grant labor unions any premium assistance subsidies for their employer-sponsored health plans,” the lawmakers wrote. “We remain troubled that the administration has only made a commitment to not move forward with a rule through the IRS, but has left the door open for the Department of Labor (DOL) to issue a regulation favoring labor unions.”

They noted that there have been reports that OMB briefly posted on its website a proposed DOL rule “that would reportedly allow union workers to obtain premium subsidies.”

*Politico* recently wrote that the White House, according to a senior administration official, had, in fact, “looked at several ways to make the union plans eligible for subsidies but couldn’t find one.”

“It’s black and white,” the official was quoted as saying.

Camp and Hatch had warned that efforts by the administration to allow subsidies in multi-employer plans “will be met with strong resistance.”

On September 5, Camp and House Education and the Workforce Committee Chairman John Kline, R-Minn., wrote to Congressional Budget Office (CBO) Director Douglas Elmendorf to ask that CBO provide, among other information, a projection of the cost of extending tax credits to participants in multi-employer plans.

Sen. John Thune, R-S.D., meanwhile, introduced the “Union Bailout Prevention Act” (S. 1487) on September 9, which expressly states that tax credits may not be provided to participants in multi-employer health plans.

### **House Passes Bill to Require Eligibility Verification for Insurance Tax Credits**

The House of Representatives on September 12 passed a Republican-backed bill that would prohibit anyone from receiving tax credits for health insurance purchases in the new exchanges until a mechanism is in place to verify the income and insurance status of applicants.

The 2010 Patient Protection and Affordable Care Act directed that exchanges – also referred to as “marketplaces” – be created in every state to provide a place for individuals

and small businesses to buy coverage starting January 1, 2014, with open enrollment beginning October 1 of this year. Only 16 states and the District of Columbia will operate their own exchanges, while 15 will have joint federal-state ventures and 19 will have exchanges run out of Washington. Consumers in the exchanges are eligible for subsidies if they cannot get coverage through their employer and their income is below 400 percent of the federal poverty level. The law directs that exchanges verify the income of all applicants and conduct random checks regarding the absence of employer coverage.

The Department of Health and Human Services (HHS) released rules on July 5 that indicated that state-run exchanges will not have to begin checks of employer coverage until 2015, and that random income checks in cases in which the self-reported numbers appear questionable will suffice in 2014. During the first year that the exchanges are operating, HHS stated in the regulations, states will have “temporarily expanded discretion to accept an attestation of projected annual household income without further verification.” Exchanges in which the federal government is involved will conduct random checks of both income and employer coverage status in 2014.

The “No Subsidies Without Verification Act” (H.R. 2775) from Rep. Diane Black, R-Tenn., would block the tax credits until “the Secretary of Health and Human Services certifies to the Congress that there is in place a program that verifies ... the household income and coverage requirements of individuals applying for such credits.” The House passed the bill 235-191.

“When it comes to Obamacare, yes, delay, defund, repeal, replace,” Black said. “That is exactly what we want to do because this law has become so amazingly unpopular with the American people. ... The reason we are bringing this legislation forward is because there is a gaping hole. We know that having self-attestation for getting these taxpayer subsidies in these exchanges is going to lead to an incredible amount of fraud.”

House Majority Leader Eric Cantor, R-Va., has said that the vote was part of a GOP plan to hold “a series of strategic votes throughout the fall to dismantle, defund and delay Obamacare.”

Centers for Medicare and Medicaid Services (CMS) Administrator Marilyn Tavenner wrote in a July 9 blog post on the HHS website that, notwithstanding the “temporarily expanded discretion,” it is a “myth” to say that the government will not verify income information

“No matter which type of Marketplace is operating in a state, the Marketplace will always check the income information submitted by individuals against electronic income data sources such as tax filings, Social Security data, and current wage information,” Tavenner wrote. “In most circumstances, we will request additional documentation from all affected individuals, such as when an individual does not have a tax return on file and attests to an income significantly below current wage data.”

Tavener also dismissed as a myth the assertion that employer-based coverage verification is being delayed. The only change in the final rule, she said, is that “State-based marketplaces can decide whether and how to conduct such verifications in the first year of operations.”

### **Rule Proposed for Employer Reporting of Health Insurance**

The Treasury Department and the IRS on September 5 released a proposed rule for health insurance information reporting by employers.

One of the major components of the 2010 Patient Protection and Affordable Care Act (ACA) is a requirement that employers with at least 50 full-time employees offer health insurance coverage meeting certain requirements for benefits and affordability or pay a penalty. The employer mandate was supposed to go into effect on January 1, 2014, but Obama administration officials announced in July that they are delaying enforcement for one year in order to ease the logistical challenges that the mandate creates for businesses and provide time for the implementation of an effective reporting mechanism.

The proposed rule would:

- Replace Section 6056 employee statements with Form W-2 reporting on offers of employer-sponsored coverage to employees, spouses and dependents.
- Eliminate the need to determine whether particular employees are full-time if adequate coverage is offered to all potentially full-time employees.
- Allow employers to report the specific cost to an employee of purchasing employer-sponsored coverage only if the cost is above a specified dollar amount.
- Allow self-insured group health plans to avoid furnishing employee statements under both Section 6055 and Section 6056 by furnishing a single substitute statement.
- Limit reporting for certain self-insured employers offering no-cost coverage to employees and their families.
- Permit health insurance issuers to forgo reporting under Section 6055 on individual coverage offered through an exchange because that information will be provided by the exchange.
- Permit health insurance issuers, employers, and other reporting entities under Section 6055 to forgo reporting the specific dates of coverage (instead reporting only the months of coverage), the amount of any cost-sharing reductions, or the portion of the premium paid by an employer.

“Today’s proposed rules enable us to continue engaging on how best to implement the ACA reporting requirements in a more streamlined and focused manner,” Assistant Treasury Secretary for Tax Policy Mark Mazur said. “We will continue to consider ways, consistent with the law, to simplify the new information reporting process and bring about

a smooth implementation of those new rules. Doing so will help ensure that the ACA effectively and efficiently delivers its historic tax benefits that promote health security for all Americans.”

The Treasury Department is encouraging employers to comply with the final rule immediately after it is published, even though compliance will not be required until 2015, stating in a press release that, “Real-world testing of reporting systems in 2014 will contribute to a smoother transition to full implementation in 2015.”  
Comments will be accepted on the proposal through November 8.

### **NCHC, Moment of Truth Project Propose Medicare Reforms**

A group supported by CalPERS has co-produced a set of proposed Medicare reforms.

The National Coalition on Health Care (NCHC) and the Moment of Truth Project released a report on September 13 that aims to identify “delivery system and payment reforms in Medicare and across the health system overall.”

CalPERS is a member of NCHC, and CalPERS Board of Administration Vice President George Diehr serves on the organization’s board. The Moment of Truth Project is led by Erskine Bowles and Alan Simpson, the co-chairs of the 2010 National Commission on Fiscal Responsibility and Reform.

Noting that national health care expenditures are projected to grow from \$2.9 trillion this year to \$4.7 trillion by 2021, the report stated that a “fundamental realignment of incentives aimed at better care and lower cost growth” is needed.

The report’s recommendations are based on three principles: 1) reward value instead of volume; 2) promote care coordination; and 3) increase competition in the health care system. They include:

- Replace Medicare’s sustainable growth rate (SGR) formula with a model that encourages care coordination and enhances quality
- Base a portion of a provider’s payment on measures of care quality or value
- Implement value-based insurance design, which adjusts cost-sharing to provide beneficiaries with incentives to seek high value and care coordination
- Allow providers to share in savings if certain budget and quality targets are achieved, and enable state governments to share in savings if they lower health care spending without compromising quality or access
- Expand penalties for avoidable hospital readmissions, while adding reforms to protect safety net providers
- Increase penalties for high rates of avoidable complications and expand the penalties to a broader set of providers
- Reform the medical malpractice system to reduce the cost of defensive medicine and promote safe, evidence-based medicine

- Expand bundled payment arrangements
- Improve care coordination for “dual eligibles” in Medicare and Medicaid
- Create an alternative benefits package that moves away from fee-for-service Medicare and encourages care coordination
- Expand competitive bidding for durable medical equipment and other services
- Remove barriers to generic competition in Medicare’s Low-Income Subsidy program

“While the options described here focus on Medicare policy, they are intended to spark changes in health care delivery and payment that will produce lower costs and better outcomes across the health system,” the report stated. “Because Medicare has such a large role in paying for health care services, successful implementation of delivery system reforms in the Medicare program would not only reduce federal health spending, but would lead to structural improvements in the health care system overall, which would substantially slow the growth of health spending in the public and private sector beyond the direct savings to Medicare.”

NCHC President and CEO John Rother suggested that savings produced by the reforms could be used to help pay for a replacement to Medicare’s SGR formula.

“These ideas that we put forward are potential savers, and so that could very much enable the SGR bill to go forward,” Rother said.

The SGR, which was intended by Congress to automatically set Medicare’s physician payment rates, annually threatens to slash the federal government’s payments to doctors for services provided to Medicare patients. This year, were it not for a provision included in the “fiscal cliff” deal that passed in January, payments would have been cut by 26.5 percent. The cuts are blocked for only a year, though, and the SGR calls for the rates to be reduced by 25 percent in January 2014. Congress has overridden the SGR calculations every year since 2003 in order to avoid payment cuts that, it has been feared, would drive doctors out of the Medicare program.

The House Energy and Commerce Committee on July 31 advanced the “Medicare Patient Access and Quality Improvement Act of 2013” (H.R. 2810), which would replace the SGR with “an improved fee for service system in which providers report quality measures that will lead to better care in a more efficient manner.” It would provide for annual payment increases of 0.5 percent for five years as Medicare and providers transition to a quality incentive program.

The Congressional Budget Office released a report in September that concluded that the legislation would cost \$176 billion over the first 10 years, starting at \$9 billion in 2014 and growing to \$29 billion in 2023. The Energy and Commerce bill does not include a plan for covering those costs.

CBO had previously estimated that replacing the SGR would cost \$139 billion over 10 years, but that was based on more generic projections, not a specific bill.

The House Ways and Means Committee and the Senate Finance Committee are expected to propose their own SGR reform bills.

### **Health Insurance Exchange Premiums 16% Below Projections**

Premiums for policies purchased in the health insurance exchanges that are to begin next year will be well below what had been expected, according to the Department of Health and Human Services (HHS).

The 2010 Patient Protection and Affordable Care Act directed that exchanges – also known as “marketplaces” – be created in every state to provide a place for individuals and small businesses to buy coverage starting January 1, 2014. Open enrollment began on October 1.

Using data from 47 states and the District of Columbia, HHS found that the average cost of the second-least-expensive “silver” plan – the exchanges will offer gold, silver and bronze plans with different levels of benefits – will be 16 percent below the price that had been projected by the Congressional Budget Office (CBO). The department noted that 95 percent of uninsured people who are expected to be eligible to participate in the exchanges live in states with premiums that have come in below projections.

In the California exchange, the second-least-expensive silver plan will cost \$373 a month next year.

Consumers in the exchanges will be eligible for tax credits if they cannot get coverage through their employer and their income is below 400 percent of the federal poverty level.

“After taking tax credits into account, fifty-six percent of uninsured Americans ... may qualify for health coverage in the Marketplace for less than \$100 per person per month, including Medicaid and CHIP in states expanding Medicaid,” the report stated.

## **RELATED NATIONAL AND INDUSTRY NEWS**

### **NASRA Issue Brief Examines Hybrid Pension Plans**

The National Association of State Retirement Administrators (NASRA) has released an issue brief on hybrid pension plans.

Hybrid plans – often in the form of cash balance plans – combine features of defined benefit (DB) and defined contribution (DC) plans. NASRA noted that “this plan design has received increased attention in recent years. This new focus occurs as states find that closing their traditional pension plan to future (and, in some cases, existing) employees

could increase – rather than reduce – costs, and that providing only a 401(k)-type plan does not meet important retirement security, human resource, or fiscal objectives.”

The issue brief examines features in select plans across the country, noting that participation is generally mandatory; the plans “typically employ a shared financing approach to retirement benefits”; assets are “pooled, invested by professionals, and guarantee annual returns to plan participants”; and the DB portion of the plan typically must be paid out in the form of an annuity.

“While DB plans remain the prevailing model, cash balance and DB+DC plans have been in place for many years in some states, and are new in others,” the issue brief stated. “The diversity in public sector plan design reflects the fact that a one-size-fits-all solution does not meet public employer human resource and fiscal objectives. Like defined benefit plans, cash balance and DB+DC plans in the public sector vary from one jurisdiction to the next, and no single design will address the cost and risk factors of every state or local government.”

### **Study Projects \$4.1 Trillion Shortfall for Public Pensions**

Public pensions have a long-term funding shortfall of \$4.1 trillion, according to a study released by conservative-leaning State Budget Solutions (SBS).

The underfunding projection is well above several other estimates and is several times the projection made by the public pension community. The difference comes from this study’s use of a “fair-market valuation.”

Public funds typically assume investment returns of around 8 percent, but SBS – and other critics – argue that this is over-optimistic and understates the size of the financial commitment that must be made by taxpayers to cover promised benefits. The SBS study – titled “Promises Made, Promises Broken – The Betrayal of Pensioners and Taxpayers” – bases its projections on the yield of a 15-year Treasury bond, which, as of August 21, was 3.225 percent.

“This fair-market valuation shows the tremendous impact that the choice of a discount rate has on funding health,” the study stated. “It demonstrates the extent to which current funding practices undervalue the retirement promises made to public employees. According to official reporting, the overall funded ratio of state plans included in this report is 73 percent – a far cry from the 39 percent level that a fair-market valuation has revealed.”

The study concluded that California’s public pensions are 42 percent funded and have a shortfall of \$641 billion.

Public pension officials have frequently asserted that their investment projections are consistent with historical long-term returns.

State Budget Solutions has partnered with conservative and libertarian organizations such as the American Legislative Exchange Council and the Mercatus Center at George Mason University.

The organization released a report in 2012 that concluded that public pensions were 41 percent funded and had a \$4.6 trillion shortfall.

## CALIFORNIA CONGRESSIONAL DELEGATION NEWS

### **GOP Still Does Not Like Consumer Financial Protection Bureau**

Even with the controversy surrounding the appointment of the Consumer Financial Protection Bureau (CFPB) director settled, Republicans indicated in September that they retain major objections to the agency.

The CFPB was created by the 2010 Dodd-Frank Act to oversee mortgages, credit cards and other consumer financial products. Republicans have opposed it from the start, arguing that it is poorly structured and is likely to have a negative impact on the economy.

CFPB Director Richard Cordray appeared at a House Financial Services Committee hearing on September 12 to discuss the bureau's semi-annual report. Committee Chairman Jeb Hensarling, R-Texas, who has been one of the leaders of the GOP opposition to the agency, referred to the CFPB in his opening statement as "arguably the single most powerful and least accountable federal agency in the history of America."

Hensarling reiterated Republican complaints that the bureau has two major structural flaws - it is funded through the Federal Reserve, rather than the congressional appropriations process, and it is led by a director, rather than a commission. Hensarling also asserted the CFPB is not accountable to the president, the courts, or "even to itself since there is fundamentally no 'it,' no 'they' - only a he. There is no commission, only one omnipotent director, fundamentally accountable to no one."

"Combined with this breathtaking lack of accountability is a grant of power under Dodd-Frank to the CFPB director that is unilateral, unbridled and unparalleled," Hensarling said. "The director can unilaterally declare virtually any financial product or service as 'unfair,' or 'abusive,' at which point Americans will be denied that product or service even if they need it, understand it and want it. Be he our credit czar, national nanny or benevolent financial product dictator, Mr. Richard Cordray is now empowered fundamentally to decide what types of credit cards Americans are allowed to have, what types of mortgages they may have, whether or not they can access a payday lender. All of this does beg the question: Who will protect consumers from the Consumer Financial Protection Bureau?"

Rep. Maxine Waters of California, the committee's ranking Democrat, though, commended Cordray for the bureau's achievements.

“Importantly, the CFPB has ensured – for the first time – that someone is monitoring a number of industries that have a history of problematic interactions with consumers,” Waters said. “These include the hundreds of millions of consumers interacting with consumer reporting agencies, debt collectors, and payday lenders just to name a few. In just the past few months, we have seen the agency investigate and raise concerns about the harmful impact of a number of practices on consumers, including overdraft fees, private education loans, and the cycle of debt that payday and deposit advance loans can become.”

Cordray’s brief opening statement reviewed some highlights of the semi-annual report and called the CFPB “the nation’s first federal agency whose sole focus is protecting consumers in the financial marketplace.” He said that the bureau had received more than 130,000 consumer complaints as of the end of 2012 and that, in its first enforcement actions “against credit card companies that deceived and misled consumers ... we were able to secure \$425 million in relief for 6 million consumers, and we also imposed penalties on the companies to deter such activity in the future.”

Cordray was confirmed as director by the Senate in July after serving through a controversial recess appointment for 18 months. Republicans long refused to allow a vote on his nomination unless the bureau’s structure was reformed, but a bipartisan agreement was eventually reached regarding the use of filibusters to block votes on presidential nominees.

A constitutional issue also arose during that time. Cordray’s recess appointment was made by President Obama on January 4, 2012. On January 25, 2013, a federal court ruled that Obama’s recess appointments of three people to the National Labor Relations Board (NLRB) – which were made on the same day as the Cordray appointment – were unconstitutional. The administration has appealed the case to the U.S. Supreme Court.

Cordray had originally been scheduled to appear before the Financial Services Committee to testify about the bureau’s semi-annual report on April 23, but Hensarling wrote to him on April 22 to tell him that the panel did not want to hear from him.

“Because you were appointed on the same day and in the exact same manner as these unconstitutional [NLRB] appointments, it is clear, as a number of legal scholars have concluded, that your appointment was also unconstitutional,” Hensarling wrote. “Absent contrary guidance from the United States Supreme Court, you do not meet the statutory requirements of a validly-serving Director of the CFPB, and cannot be recognized as such.”

Hensarling obliquely referenced this at the September 12 hearing, stating, “the bureau’s latest semi-annual report may be a little bit dated due to the legal controversy that previously surrounded your appointment and thus delayed your timely appearance.”