SEPTEMBER 2012

With the two major parties having held their conventions and officially nominated their candidates, the presidential race entered the home stretch in September, and amid several damaging gaffes by Republican Mitt Romney, President Obama appeared to gain ground in some key swing states. The House of Representatives returned from its August recess, but only briefly. It will be in session the first week of October, then it is expected to be done until after Election Day, so that members can return to their districts to campaign themselves. The Senate also came back to Washington and, with only one-third of its members facing expiring terms, it is staying in session for much of the rest of the year.

ISSUES AND EVENTS

House Panel Votes to Clarify Law Regarding Public Plan Trustees

In a rare display of bipartisanship, the House Financial Services Committee unanimously approved a bill that would exempt public pension plan trustees from regulations governing municipal advisers.

The Dodd-Frank Act, which overhauled financial regulations in 2010, imposed new obligations on those who advise municipalities regarding bond offerings, investment decisions or similar matters, and the Securities and Exchange Commission (SEC) has issued proposed rules to implement those obligations that investors have found troubling. In its release, the SEC indicated that elected members of public pension boards would fall outside of the definition governing who is a municipal adviser, but appointed members would not. Thus, appointed pension plan trustees would be deemed advisers to the fund.

"The commission believes that this interpretation is appropriate because employees and elected members are accountable to the municipal entity for their actions," the SEC stated. "In addition, the commission is concerned that appointed members, unlike elected officials and elected ex officio members, are not directly accountable for their performance to the citizens of the municipal entity."

After significant pushback from CalPERS and others, SEC officials seemed to step away from this interpretation, indicating that they were reconsidering the definition in light of the concerns expressed. However, it has been more than 18 months since the proposal was released, and it is unknown when the SEC will issue its final rule.

The measure adopted by the House panel would put an end to this debate and ensure that appointed trustees are not deemed to be advisers to the plan.

With the legislative session winding down in advance of the November elections, it is unlikely the bill will see floor action prior to the "lame-duck" session at the end of the year.

Pensions Analyzed at Senate Hearing

Stating that "The disappearance of pensions has had a profoundly negative impact on retirement security in this country," Senate Health, Education, Labor and Pensions Committee Chairman Tom Harkin, D-Iowa, convened a hearing on Sept. 20 to examine the issue.

Harkin in July released a report in which he proposed creating "Universal, Secure and Adaptable (USA) Retirement Funds." These portable funds would be privately run and professionally managed and investments would be pooled. Participants would receive a defined monthly benefit during retirement that would be based on the total amount of contributions made by them or on their behalf and investment performance.

Aliya Wong, executive director of retirement policy at the U.S. Chamber of Commerce, stressed that the offering of an employer-based retirement plan must be voluntary.

"While there is widespread agreement on the importance of retirement savings and programs, not every employer is able to offer a retirement program," Wong said. "Employers that have extremely small profit margins cannot afford mandatory benefits without losing employees. In addition, concerns about liability and administrative burdens could also negatively impact the productivity of business."

She added that regulatory burdens should be minimized and employers should be allowed to design a plan that best fits their company's needs, so "it is more important than ever to ensure that there are no statutory, practical, or political barriers to innovation that would discourage participation in the private retirement system."

Andrew Biggs, resident scholar at the American Enterprise Institute, largely defended the defined contribution model, noting that defined benefit pensions, while having some positives, are often a bad fit for a mobile workforce, and even asserted that "There is evidence that a significant part of the shift from DB to defined contribution pensions was driven, not by businesses, but by the employees businesses seek to attract."

Biggs said that a modern retirement system should "capture the advantages of DB pensions while avoiding their disadvantages" and must be streamlined, low-cost, convertible to a lifetime income and financially transparent.

John Adler, Retirement Security Campaign director of the Service Employees International Union, rejected Wong's argument regarding voluntary participation, saying contributions by employers and employees "should be phased in to a mandatory minimum level that is adequate to provide for enough income replacement after a lifetime of work in combination with Social Security to maintain workers' standard of living throughout their retirement."

He briefly shared some common ground with Biggs in acknowledging the mobility of the modern workforce but said this should be addressed by making plans "portable and universal, with immediate vesting, so that employees' accounts receive contributions throughout their working lives."

The committee also heard from three witnesses from the private sector, as well as representatives of Retirement USA and the Center for American Progress.

6 Million to Pay Penalty for No Insurance in 2016: CBO

About 6 million Americans will pay a penalty for not having health insurance in 2016, a 50 percent increase from previous projections, according to a report from the Congressional Budget Office.

The 2010 Patient Protection and Affordable Care Act requires nearly all Americans to have health coverage starting in 2014 or pay a penalty that, in 2016, would be the greater of $695 or 2.5 percent of annual income. CBO expects that 30 million non-elderly Americans will be without insurance in 2016, but most of them will not be subject to the penalty because they are unauthorized immigrants, are members of an Indian tribe, have very low incomes or have been granted exemptions for hardship or religious reasons. The figure also accounts for a certain amount of non-compliance in paying the penalty among those without insurance.

The 6 million who are expected to pay the penalty will send a total of $7 billion to the federal government in 2016 for their failure to have insurance, the CBO reported.

"This report confirms that more than 98 percent of Americans won't be affected by this penalty," Department of Health and Human Services spokeswoman Erin Shields Britt said. "Under the law, we're no longer going to subsidize the care of those who can afford insurance but make a choice not to buy it."

Republicans, though, pounced on the increased projections.

"The bad news and broken promises from ObamaCare just keep piling up," House Ways and Means Committee Chairman Dave Camp, R-Mich., said. "The bulk of the law hasn't even gone into effect yet and already the nonpartisan CBO is increasing its predictions as to how many middle-class and low-income Americans will see their taxes increase because of ObamaCare. This is yet another example of why we need to repeal this law and replace it with a bill that not only lowers health insurance premiums but does so without raising taxes."

Previous projections from the CBO put the penalty numbers at 4 million Americans and $4 billion in fees to be paid. The increase results from legislative changes, a more pessimistic economic outlook, technical updates and expectations that some states will not expand Medicaid to the extent that had been envisioned. (This year's U.S. Supreme Court ruling that upheld the insurance mandate based on the court's interpretation of the penalty as a tax struck down a provision in the health care reform law that would have revoked all Medicaid funding from states that do not expand their programs.)

Electronic Health Records Linked to Rising Medicare Costs

Increasing use of electronic health records has led to increased costs for Medicare, possibly resulting from fraud and abuse, according to an analysis by the Center for Public Integrity.

The federal government offers financial incentives for health care facilities and providers to convert to digital records, a project that is intended to improve quality of care and, in the long run at least, reduce costs. Between 2006 and 2010, though, Medicare payments to hospitals that received incentives rose 47 percent, significantly higher than the 32 percent increase at hospitals that did not receive any incentives, *The New York Times* reported.

Digital records, some say, make it easier for health care providers to engage in "upcoding" and report that certain procedures were performed, even if they were not. For example, a doctor might only have to check a box to indicate that he or she conducted a full examination of a patient. The *Times* quoted Donald Simborg, who chaired federal panels that examined the potential for fraud with electronic systems, as saying, "It's like doping and bicycling. Everybody knows it's going on."

Some hospitals and doctors, though, have responded that they often under-billed before, and electronic records have increased payment accuracy.

"This is a new era for investigators," said Jennifer Trussell, director of the investigations unit of the Department of Health and Human Services Office of Inspector General. "We are all excited about the many benefits of electronic health records, but we need to be on the lookout for unscrupulous providers who take advantage of this new technology."

U.S. Performs Relatively Poorly in Preventable Deaths: Study

The preventable death rate in the United States has some room for improvement, according to a new study by The Commonwealth Fund.

In analyzing deaths in four industrialized countries that could have been prevented by timely access to health care – as with diabetes complications and acute infections – the study found that the rate in the U.S. is significantly worse than the rate in France, Germany and the United Kingdom. In fact, the U.S. preventable death rates for men under age 65 (69 per 100,000) and women under age 65 (56 per 100,000) were 85 and 65 percent higher, respectively, than the levels in the best-performing country, France.

Preventable death rates in the U.S. for the Medicare-eligible 65-74 age group were closer to those found in Europe.

While the rate fell in the U.S. by 18.5 percent for men and 17.5 percent for women between 1999 and 2007, this decrease was much smaller than the reductions in the other three nations.

Commonwealth Fund President Karen Davis said the 2010 health care reform law should help to improve the numbers in the U.S.

“Despite spending about twice as much per person each year on health care as France, Germany or the U.K.— $8,400 in 2010—the U.S. is increasingly falling behind these countries in terms of progress in lowering the potentially preventable death rate,” Davis said. “The good news is that the Affordable Care Act is already beginning to close the gaps in access to care. When fully implemented, it will cover nearly all Americans, with the potential to put our country on track to improve to levels seen in the best-performing countries.”

Health Reform to Save Medicare Beneficiaries $5,000 on Average through 2022: DHS

People with Medicare will save an average total of $5,000 between 2010 and 2022 because of the 2010 health care reform law, according to the Department of Health and Human Services.

Much of the savings results from reduced spending on prescription drugs because of the law’s phasing out of the “donut hole” in Medicare Part D drug coverage. The law also allows Medicare beneficiaries to receive certain preventive health services at no cost.

“I am pleased that the health care law is helping so many seniors save money on their prescription drug costs,” Secretary Sebelius said. “A $5,000 savings will go a long way for many beneficiaries on fixed incomes and tight budgets.”

Medicare residents in California are expected to save a total of $367 million through 2022 from the closing of the donut hole.

Senate Panel Reportedly Probing J.P. Morgan Trading Loss

A congressional investigations panel is probing the multi-billion dollar trading loss at J.P. Morgan, according to published reports.

The financial firm announced several months ago that it lost $2 billion in a derivatives trade, but the loss has nearly tripled since then. Although J.P. Morgan CEO Jamie Dimon has insisted before Congress that "no client, customer or taxpayer money" was affected by the loss and the company remains financially sound, the trade has been at the center of debates in Washington over the proper size of financial outlets and the role of regulation.

Reports in September indicated that the Senate Permanent Subcommittee on Investigations is looking into the trade. The investigation has not been officially been made public, however, and committee Chairman Carl Levin, D-Mich., declined to comment. Levin is one of the strongest supporters in Congress for a toughly-written Volcker rule, a yet-to-be implemented provision in the 2010 Dodd-Frank financial regulations reform law that is intended to prohibit banks from conducting most proprietary trading. Opinions have varied as to whether the Volcker rule, had it been in place, would have prevented the ill-fated trade at J.P. Morgan.

While Dimon has appeared before multiple congressional committees, Levin's panel is known for conducting inquiries that are much longer and more detailed than are typically possible on other committees. There is also a certain amount of bipartisanship on the panel. For example, the committee in April 2011 released a 650-page report on "Wall Street and the Financial Crisis" under the names of both Levin and ranking Republican Tom Coburn of Oklahoma. The report summarized a two-year investigation and identified high-risk lending, regulatory failure, inflated credit ratings and investment bank abuses as causes of the financial downturn in the United States in 2008-09.

Senators Review Consumer Bureau Report

During its first year of existence, the Consumer Financial Protection Bureau "has worked to create an infrastructure that promotes transparency, accountability, fairness, and service to the public," bureau director Richard Cordray told the Senate Banking, Housing and Urban Affairs Committee in September.

The panel held a hearing on Sept. 13 to review the bureau's semi-annual report, which covers the first half of 2012. The 2010 Dodd-Frank financial regulations reform law established the bureau, which became active on July 21, 2011, to oversee mortgages, student loans, credit cards and other consumer financial products. It has been one of the most unpopular provisions of the law among Republicans.

Cordray highlighted the bureau's work on mortgage issues and other matters.

"Through our regulatory tools, we have proposed smarter rules that will help fix the broken mortgage market with common-sense solutions," he said. "We are writing rules that simplify mortgage disclosure forms and rules that make sure consumers do not receive mortgages that they do not understand or cannot afford. … We are holding both banks and nonbanks accountable for following the law. Prior to my appointment, nonbanks had never been federally supervised. … We also have the authority to supervise the 'larger participants' among nonbanks in other consumer finance markets as defined by rule. So far, we have added credit reporting companies to this group."

Cordray noted that the bureau had received more than 72,000 complaints related to all of the products that it oversees. It is now receiving complaints at a rate that projects to about 120,000 a year, he added.

Some Republicans on the committee reiterated their concerns that the bureau – which is funded through the Federal Reserve, not directly by Congress – is too independent. Sen. Richard Shelby, R-Ala., the panel's ranking member, even suggested that the bureau "believes it can just ignore the law" when it writes its regulations. Cordray responded that, "Congress intends us to write rules around disclosures and to clarify and interpret the laws."

Related National and Industry News

NCPERS Head Chides *Washington Post* on Public Pension Comments

The head of NCPERS in September chided *The Washington Post* for comments the newspaper's editorial department made regarding the financial issues involved with funding public employee pensions.

In a Sept. 1 editorial, the *Post* wrote that Democrats, notwithstanding their traditional alliance with public workers, must "tackle with some urgency" the pension funding challenges in California, Illinois and other states. "For the party of activist government, the competing interests of their public-sector union backers and their other constituents spell trouble, in both political and policy terms. It's a conflict that Democrats may be uniquely well positioned to resolve, given their close ties to unions — or uniquely incapable of resolving, for the same reason."

The part that got the attention of Hank Kim, executive director of the National Conference on Public Employee Retirement Systems (NCPERS), was the *Post*'s observation that "Public-sector employees have been able to negotiate pensions and health-care benefits that often exceed those available to private-sector workers whose tax dollars finance state and local governments." Kim, in a letter to the editor that was published in the *Post* on Sept. 7, rejected this statement and said that the newspaper had things "exactly backward."

"What is true is that, a generation ago, private-sector workers enjoyed the same kinds of retirement and health benefits as public employees did," Kim wrote. "But over the years, private-sector employers have abandoned pensions in favor of 401(k) plans — which is why workers saw their retirement savings deflate markedly during the Great Recession. Private employers have also scaled back health benefits in an effort to save money and/or boost profits. So it's not that public employees have negotiated more. It's that private employers have taken away more."

Kim went on to endorse a pension proposal from Senate Health, Education, Labor and Pensions Committee Chairman Tom Harkin, D-Iowa, that is aimed at expanding the availability of retirement accounts.

“Stripping away public pensions is not the answer to America’s retirement crisis,” Kim wrote. “Establishing affordable, easily administered private-sector pension plans is.”

CALIFORNIA CONGRESSIONAL DELEGATION NEWS

House Panel Examines Insurance Exchange Implementation

Several witnesses told a congressional panel in September that the federal government has failed to provide adequate guidance for states to implement health insurance exchanges.

The 2010 Patient Protection and Affordable Care Act (ACA) requires the creation of at least one insurance exchange in each state – the federal government will establish one if a given state chooses not to – starting in January 2014. The exchanges are to serve as a marketplace for individual and small business buyers of health insurance.

While the Department of Health and Human Services (HHS) has issued some exchange guidelines, Pennsylvania Insurance Commissioner Michael Consedine told the House Ways and Means Committee’s Health Subcommittee during a Sept. 12 hearing that states “lack clear direction and the flexibility promised us has not materialized.”

“The lack of detailed information from HHS has put Pennsylvania and many other states in a very difficult position,” Consedine said. “We are traveling down a road directionless, while knowing the road will end soon – January 2014 is right around the bend. Pennsylvania, like many other states, needs final rules and guidance on exchanges in order for us to determine what course is the best for our state.”

Consedine said that HHS’ final rule on exchange establishment contained “approximately 100 references to ‘future’ or ‘forthcoming’ guidance or regulation,” none of which has been published.

Neil Trautwein, vice president of the National Retail Federation, echoed some of Consdeine’s comments, saying the organization is “greatly concerned by delays in issuing regulations, agency reliance on temporary guidance rather than formal regulations, and the fast approaching deadlines for key issues affecting coverage in every market.”

Trautwein objected, in particular, to the use of relatively informal guidance, such as bulletins and FAQs, rather than official rules and regulations that go through a public comment process. He said that “definitive regulatory guidance is lagging” on such issues as federally-run exchanges in states that do not set up their own; coordination of information from employers, employees and federal databases; and the composition of “essential health benefits benchmarks.”

Daniel Durham, executive vice president of America's Health Insurance Plans, similarly said that "there is an urgent need for more regulatory clarity with respect to exchanges and insurance market reforms."

The director of an organization that is helping states to implement exchanges, however, said that "there is a clear path forward for all states resulting from the flexibility offered by HHS with three different exchange models."

"While hurdles remain to be overcome, many states are actively working and are on schedule to stand up exchanges that will provide a competitive marketplace for individuals and small businesses to shop for affordable coverage just over a year from now," said Heather Howard, director of the Robert Wood Johnson Foundation's State Health Reform Assistance Network.

Meanwhile, Rep. Pete Stark of California, the ranking Democrat on the Republican-controlled panel, said that the criticisms about regulations are much ado about nothing, since it is still too soon to worry about a lack of guidance.

"If we are in this situation next spring, a hearing would be a good idea," Stark said. "To the extent regulations aren't final yet, it appears to me that is directly related to the lengths to which the administration has gone to solicit and consider input from a variety of stakeholders – states, insurance companies, employers and others. My Republican colleagues, on the other hand, would have you believe it is utter chaos. … Today's hearing isn't timed to provide clarity. It is designed to present a false sense of confusion."