NOVEMBER 2012

Americans voted for four more years of President Obama in November, largely ensuring that the two signature domestic achievements of his first-term – health care reform and financial regulations reform – will be fully implemented as planned. Control of Congress stayed mixed, with Republicans maintaining their majority in the House and Democrats doing the same in the Senate, so legislative gridlock is probably not likely to abate much. Soon after Election Day, Obama and congressional leaders began working on a plan to avoid the "fiscal cliff," a set of tax hikes and spending cuts that, in the absence of action by Congress, will go into effect on January 1, potentially having disruptive effects on the U.S. economy.

ISSUES AND EVENTS

California to Send 14 Freshmen to Congress in 2013

The status quo was maintained on Election Day at the national level, but the California congressional delegation will look significantly different in 2013.

President Obama handily won reelection on November 6, likely ensuring that the health care reform and financial regulations reform laws that were passed in 2010 will continue to be implemented as planned. Obama will have to continue to work with a Republican-controlled House of Representatives, though that chamber's leadership has signaled some willingness to compromise more on tax and budget issues that must be resolved by the end of the year in order to avoid potentially serious economic disruptions. The Senate, meanwhile, remained under Democratic control.

California's 53-member congressional delegation, however, will include 14 freshmen in 2013 as a result of incumbent losses and retirements. Perhaps the most notable electoral defeat was suffered by Democratic Rep. Pete Stark, who has served in Congress since 1973. Stark has been one of his party's leaders on health care issues and is the ranking member of the House Ways and Means Committee's Health Subcommittee. He lost in a redrawn district to a fellow Democrat, since new state laws stipulate that the top two vote-getters in an open primary face each other in the general election, even if they are in the same party.

Other losing incumbents included Republican Reps. Dan Lungren, Brian Bilbray and Mary Bono Mack and Democratic Reps. Howard Berman, Joe Baca and Linda Richardson. Berman lost to another sitting Democratic congressman, Brad Sherman.

The delegation is also losing several long-term members of Congress to retirement, including GOP Reps. David Dreier, Jerry Lewis, Wally Herger and Elton Gallegy and Democratic Rep. Lynn Woolsey. Dreier chairs the Rules Committee, and Herger chairs the Ways and Means Committee's Health Subcommittee.

The state delegation in the next Congress will include 38 Democrats and 15 Republicans.

Congressional Panel Suggests Possible Merging of SEC, CFTC

Congress should consider merging the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), Republicans on a House panel recommended in mid-November.

In a report released November 15 on the collapse of MF Global – which, in October 2011, became the eighth-largest bankruptcy in U.S. history – the GOP-controlled House Financial Services Committee's Oversight and Investigations Subcommittee asserted that, even though both the SEC and the CFTC had oversight of the firm, there was "no record of meaningful communication between the regulators regarding MF Global before the company's final week of business. … The SEC's and the CFTC's failure to coordinate regulatory oversight of the company meant that the agencies missed several opportunities to share critical information with one another."

"Even when the SEC and the CFTC finally began communicating with one another during MF Global's last week of operations, the agencies often worked at cross-purposes," the report stated. "Had the SEC and the CFTC coordinated their supervision of MFGI and had they shared critical information about MF Global, they might have gained a more complete understanding of the company's deteriorating financial health, and they might have taken action to better protect the company's customers and investors before it collapsed."

The SEC and the CFTC have made efforts in recent years to increase coordination, but the subcommittee, nonetheless, found an "apparent inability of these agencies to coordinate their regulatory oversight efforts or to share vital information with one another."

The report stated that all of this, along with the development of financial products that have aspects of both securities and futures and, thus, have caused the SEC's and CFTC's jurisdictions to overlap, "compel the Subcommittee to recommend that Congress explore whether customers and investors would be better served if the SEC and the CFTC streamline their operations or merge into a single financial regulatory agency that would have oversight of capital markets as a whole."

The report placed much of the blame for MF Global's problems on Jon Corzine, the company's chairman and CEO. Corzine, a former chairman of Goldman Sachs, is also a Democrat who served as a U.S. senator and governor of New Jersey.

The committee's ranking Democrat, Michael Capuano of Massachusetts, said that he is "not co-sponsoring the majority's staff report on MF Global primarily due to an insufficient amount of time to review the report and go over it with other Democratic subcommittee members." Democrats are reportedly preparing an addendum to the report.

Treasury Official Notes 'Steady Progress' on Volcker Rule

Regulators are making "steady progress" toward completing the Volcker rule, a Treasury Department official said on November 16.

The Volcker rule would prohibit proprietary trading by banks – that is, trading done for the bank's own purposes, rather than at the direction of a client – and is one of the most controversial parts of the 2010 Dodd-Frank financial regulations reform law.

In remarks at the 15th Annual International Banking Conference hosted by the Federal Reserve Bank of Chicago, Treasury Under Secretary Mary Miller said that she is "pleased to report that we are making steady progress on the Volcker Rule."

She added, though, that the work has been challenging for the department and for the five other agencies – the Federal Reserve, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, and the Office of the Comptroller of the Currency – that are drafting the rule.

"We received more than 18,000 comment letters, representing a wide range of views, on the proposed rule" that was released in October 2011, Miller said. "We've gained additional insights from dozens of meetings with investor advocates, industry officials and other market participants. Our goal is to achieve a strong and consistent rule, although the process is not as easy or simple as any of us would like."

Regulators have already missed the July 21, 2012, deadline for implementation of the rule.

Supporters of a tough Volcker rule, primarily Democrats, argue that it is needed to discourage the type of excessive risk-taking that contributed to the market downturn and recession of 2007-09, while critics, mostly Republicans, caution that tight investment restrictions could hamper economic growth.

Banks are expected to have until July 21, 2014, to comply with the rule.

CFTC to Appeal Ruling Against Position Limits Regulation

The Commodity Futures Trading Commission (CFTC) has decided, by a 3-2 vote, to appeal a court ruling that struck down its position limits rule.

The CFTC adopted the rule in 2011 to cap the number of derivatives contracts a trader could hold on 28 commodities as a way of discouraging speculative trading, which some say drives up prices of certain items. A federal judge ruled against the regulation on September 28.

In announcing the commission's intention to appeal, CFTC Chairman Gary Gensler said that "it is critically important that these position limits be established as Congress required."

"As part of the Dodd-Frank Act, Congress directed the commission to limit, promptly, speculative positions in physical commodity futures and options contracts and economically equivalent swaps," Gensler said. "The rule addresses Congress' concern that that no single trader be permitted to obtain too large a share of the market, and that derivatives markets remain fair and competitive."

The Securities Industry and Financial Markets Association and the International Swaps and Derivatives Association had filed a lawsuit challenging the rule last year, arguing that Dodd-Frank required the CFTC to determine that the limits were needed before implementing them. The commission, though, maintained that the rule was a mandate from Congress.

U.S. District Court Judge Robert Wilkins found that the law is unclear on this question and that the CFTC erred by reading it as "clear and unambiguous." Because the rule was based on this erroneous reading, "the Court 'may neither defer to the agency's construction nor endorse plaintiff's construction.' Instead the Court must remand this rule to the agency."

CFTC Commissioner Scott O'Malia, who opposed the position limits rule and voted against appealing the decision, criticized the CFTC's "flawed reading of the statute" and said that, even if the appeal is successful, additional legal challenges are likely.

"To save the commission's time and resources, it would be much more logical for the commission to go back to the drawing board now to study the markets and to determine whether new position limits are, in fact, necessary, and only if so, then to decide on the most cost-effective way of establishing such limits," O'Malia said. "Ideally, it would make sense for Congress to act and clarify the statute in order to end any further debate about its meaning."

States Get More Time to Decide on Health Insurance Exchanges

The Department of Health and Human Services (HHS) is giving states an extra month to decide if they want to create health insurance exchanges.

The 2010 Patient Protection and Affordable Care Act included provisions directing the creation of insurance exchanges at the state level that, starting in 2014, would provide marketplaces in which consumers could shop for health coverage, possibly with federal subsidies, depending on income level. States are not required to set up exchanges, but the federal government will establish one in any state that does not do so.

States had been required to declare their intentions regarding exchanges by November 16, but HHS Secretary Kathleen Sebelius announced the day before the deadline that they will now have until December 14. This followed a request for an extension by Republican governors, who have generally been reluctant to embrace the exchange model.

Less than a week earlier, Sebelius, in a letter to all governors, reiterated the November 16 declaration deadline while extending until December 14 the deadline to submit details about exchange creation and implementation to HHS. States planning to partner with the federal government on an exchange have until February 15, 2013, to submit both the declaration and the details. The exchanges are still expected to be launched on January 1, 2014.

Sebelius has also indicated that HHS will issue additional guidance regarding exchanges "in the coming days and weeks."

The Hill reported at the time of the second deadline extension that 17 states and the District of Columbia have committed to creating an exchange on their own, and five have indicated that they will opt for a partnership exchange with the federal government. Twenty have said no to creating exchanges (though some may be open to a partnership), and eight remain uncommitted.

NCHC Releases Health Care Financing Plan

The National Coalition on Health Care (NCHC) released a plan on November 8 that it said would produce nearly $500 billion in spending reductions and new health-related revenues, much of which would come from a new soda tax.

NCHC is chaired by CalPERS Board of Administration Vice President George Diehr.

The plan, according to the coalition, would reduce federal spending by $221 billion and would increase health-related revenues by $276 billion. Coalition officials stressed that the budget cuts would be paired with systemic reforms.

"Just picking a budget number and slashing federal programs to reach it only shifts costs to the private sectors, states or the most vulnerable," Diehr said.

The biggest savings come from creating a trigger that would impose a value-based withhold on Medicare providers if savings are not realized from specified delivery and payment reforms ($63 billion); reforming Medicare post-acute and home health payments ($37 billion); and strengthening penalties for potentially avoidable acute care readmissions ($29 billion).

Nearly half of the new revenue – $130 billion – would come from imposing a penny-per-ounce federal excise tax on sweetened beverages. The rest would come from equalizing and increasing federal taxation of tobacco ($88 billion) and equalizing federal alcohol taxes and updating them for inflation ($58 billion).

In general, the plan is based on a seven-part strategy:

- Change provider incentives to reward value, not volume.
- Encourage patient and consumer engagement.
- Use market competition to increase value.
- Ensure that the highest-cost patients receive high-value, coordinated care.
- Bolster the primary care workforce.
- Reduce errors, fraud and administrative overhead.
- Invest in prevention and population health.

"As America moves from the campaign season to actual governance, we offer a path forward, drawn from the best ideas of both parties, that can both reduce the deficit and make health care more affordable" NCHC President and Chief Executive Officer John Rother said. "More than a budgetary challenge, the question we face is a moral one – whether we can act to keep health care affordable today and for future generations."

A summary of the plan includes a case study that focuses on CalPERS' experience with "reference pricing."

U.S. Health Care System Does Not Fare Well in Survey

The U.S. health care system had a middling to poor performance in a survey of 8,500 physicians in 10 countries that was conducted by The Commonwealth Fund.

The survey found that, among other things, the U.S. had the lowest percentage of doctors – 15 percent – who said this year that their nation's "system works well," with "only minor changes needed." Germany followed at 22 percent. Norway had the highest percentage at 61.

The U.S., meanwhile, had the highest percentage of doctors – 52 percent – reporting that time expenditures related to insurance coverage restrictions is a "major problem."

Germany was the second-highest at 37 percent, and no other country was above 26 percent.

The U.S. also had the highest percentage of doctors – 59 percent – who said that patients often have difficulty paying out-of-pocket costs for medical care, well above the 42 percent in The Netherlands, which had the second-highest rate. Only 4 percent of Norwegian doctors and 6 percent of Swedish doctors said this is the case in their countries. The United Kingdom, Switzerland, Germany, Australia, New Zealand and France were all under 30 percent.

The U.S., however, did tie with the U.K. for the second-lowest rate regarding long waits to see a specialist, at 28 percent. New Zealand was highest at 75 percent, and Australia, Norway and Germany were each at 60 percent or higher.

One area in which the U.S. has made progress is in the percentage of U.S. primary care physicians who report having used electronic medical records. That number increased from 46 percent in 2009 to 69 percent in 2012. The report noted, though, that there remains a "need for intensified efforts to link practice information systems to enable communication and collaboration across care sites." Five of the surveyed countries reported utilization rates of 92 percent or higher.

More generally, 21 percent of U.S. doctors said that the country's health care system has improved in the past three years, while 25 percent said it has worsened, and 53 percent said it has stayed the same.

"The United States spends far more than the other study countries on health care services. Yet U.S. primary care physicians were the least likely to be satisfied with the practice of medicine or the health system overall," the report on the survey concluded. "In general, U.S. primary care physicians' views and experiences endorse the need for reform, including enhanced access. U.S. physicians who reported that their patients often faced cost or other access barriers were the most likely to say that the system required major change."

Deductibles in Employer-Provided Health Plans More Common, Increasing: Kaiser

Annual deductibles have become higher and more prevalent in employer-provided health care plans over the past six years, according to a study released by the Kaiser Family Foundation in early November.

Kaiser found that:

- The percentage of covered workers in a plan that includes an annual deductible increased from 52 percent in 2006 to 72 percent in 2012 (though this year's number represents a slight dip from the high of 74 percent in 2011).
- The average deductible amount increased from $584 in 2006 to $1,097 in 2012.

- Just over a third of covered workers were in a plan with a deductible of at least $1,000 in 2012, more than triple the number from 2006; 14 percent had a deductible of at least $2,000 in 2012, compared to 3 percent in 2006.
- Deductibles of $1,000 or more are much more common at small employers (those with between three and 199 workers) than at large ones (those with 200 or more workers).

Kaiser noted that deductibles are intended to encourage consumers to consider more carefully their use of health care services.

“Evidence shows that higher deductibles and other cost sharing reduce the use of health care by exposing enrollees to a larger share of their health care spending and thereby encourage them to be more selective with the services they consume,” the report stated.

Less than Half of Small Business Employees Can Get Employer-Provided Health Insurance: Commonwealth Fund

More than half of all workers at small businesses in the United States could not get health insurance through their employers in 2010, according to a Commonwealth Fund study.

In businesses with fewer than 50 employees, 49 percent of workers were offered and were eligible for health insurance by employers in 2010, a 9-point drop from 2003, the study found. Only one-third of lower-income employees at small businesses – those earning less than $15 an hour – could get insurance at the workplace. At firms with 100 or more employees, though, about 90 percent of workers had access to health insurance through their employers, a number that held steady from 2003 to 2010.

"The report highlights a nearly decade-long trend of declining health insurance coverage and rising costs for workers in small businesses, particularly those who make less than $15 an hour,” said report coauthor and Commonwealth Fund Vice President Sara Collins. “As a result, many people who work for small businesses can't afford the health care they need or have medical bills they are unable to pay.”

The report suggested that, given these numbers, the reforms in the 2010 Patient Protection and Affordable Care Act could provide significant benefits to small business employees through tax credits, rules regarding medical loss ratios – the percentage of premium revenue that must be spent by an insurer on benefits – and federally subsidized coverage through new health insurance exchanges starting in 2014.

"The Affordable Care Act is targeted to address their needs as expanded health insurance options and support for those who can't afford the premiums will assure that people have access to secure, affordable, comprehensive health insurance whether they work for a small or large employer,” Commonwealth Fund President Karen Davis said.

Related National and Industry News

Study Argues Against Switch to Defined Contribution Retirement Plans

Switching to defined contribution retirement plans in the public sector would increase costs, raise employee turnover rates, and attract less committed workers, a study from the National Institute on Retirement Security concluded.

The study noted that the 2007-09 financial crisis and market downturn led to significant fiscal challenges in defined benefit plans and accompanying political pressures to move to 401(k)-type accounts or hybrid plans. It asserted, however, that "the literature and the empirical evidence are unambiguous" that:

"First, public employers would attract a different labor force if they switched retirement benefits away from DB pensions. Public employees would become less committed to their employers and thus invest less in nontransferable skills that are critical to effective government. Second, employee turnover would increase under alternative benefits. Alternative benefits no longer defer compensation into the future and thus offer fewer economic incentives for employees to stay with public employers. Third, public employers would face higher costs, both as a result of ending the existing DB pensions and because of higher investment and administrative costs for alternative retirement plans."

NIRS Executive Director Diane Oakley noted that nearly every state has considered or enacted public pension reforms in recent years, and "nearly every state and local maintained its pension plan."

"The research finds that this outcome isn't surprising because private and public pensions have a strong track record of simultaneously meeting employers' recruitment and retention needs and employees' economic security needs," Oakley said.

California Congressional Delegation News

Report Examines Climate Change-National Security Links

It is prudent to expect that, in coming years, major weather events will occur that "will have global security implications serious enough to compel international response," the National Research Council warned in a report on the connections between climate change and U.S. national security.

Though the report cautioned that links between climate change and security are "complex, contingent, and not well enough understood to allow for prediction," it recommended that the U.S. national security and intelligence communities improve their understanding of climate change and its repercussions.

“The U.S. government should begin immediately to develop a systematic and enduring whole-of-government strategy for monitoring threats related to climate change,” the report stated. “This monitoring should be globally applicable and should include climate phenomena, exposures and vulnerabilities, and factors that link aspects of climate and vulnerability to important security outcomes.”

California Rep. Henry Waxman, the ranking Democrat on the House Energy and Commerce Committee, and Illinois Rep. Bobby Rush, the ranking Democrat on the panel’s Energy and Power Subcommittee, on November 14 urged that Congress hold a hearing to examine the report.

In a letter to Energy and Commerce Committee Chairman Fred Upton, R-Mich., and Energy and Power Subcommittee Chairman Ed Whitfield, R-Ky., Waxman and Rush wrote that “Understanding the complex relationship between global stressors and climate change is of the utmost importance to the future national security of the United States.”

This is the 18th time that Waxman and Rush have requested a hearing on climate change since March 2011. None of the previous efforts have been successful.