SEPTEMBER 2014

Members of Congress returned to Washington in September, but their stay was brief. After a five-week summer recess, the House and Senate reconvened on September 9, but lawmakers took another week off in the middle of the month then were scheduled to leave town again on October 2 for a break until after Election Day. Also in September, the United States increased its military operations against ISIS in Iraq and Syria. Even as President Obama vowed that he would not put American "boots on the ground," this stirred debate over the threat posed by ISIS and whether this justified potentially getting the U.S. into its third war in Iraq in less than 25 years.

ISSUES AND EVENTS

Senator Presses SEC Chairman on Political Donation Disclosure Rule

A New Jersey senator in September pushed for the Securities and Exchange Commission (SEC) to enact a rule requiring publicly-held corporations to disclose political donations to shareholders.

The SEC announced in December 2012 that it was considering implementing a disclosure rule, but it is no longer on the agency's agenda. The commission has received more than 1 million comments on the proposal, more than have been submitted regarding any other issue in its history. The measure is opposed by many Republican lawmakers, as well as the U.S. Chamber of Commerce and other business groups.

During a Senate Banking, Housing and Urban Affairs Committee hearing on September 9 at which White appeared with five other financial regulators, Sen. Bob Menendez, D-N.J., pressed White on the disclosure issue.

"If corporate political spending is material to investors, as the leading experts in the field and over 1 million members of the investing public believe it is, why isn't the SEC requiring public issuer companies to disclose this information," Menendez asked White. "Do you have any plans to engage in rulemaking on this issue anytime soon?"

White said that, while "I appreciate the intense interest of investors and others in this issue," the SEC "is currently not working on a proposal in that area," and is, instead, focused on implementing rules required by the 2010 Dodd-Frank Act and the 2012 Jumpstart Our Business Startups (JOBS) Act.

Menendez said that, if shareholders "can't even get basic information about what is being spent" by corporations on political issues, they will be unable to hold executives accountable.

"At the end of the day, it is the public who we collectively seek to serve, and that is best served by transparency and openness, and an opportunity to understand what companies are doing, whether that's CEO pay to worker pay or whether that's potentially using millions of dollars of corporate funds to, maybe, the disadvantage of investors who are investing in that company," Menendez said.

The push for disclosure gained momentum following the U.S. Supreme Court's 2010 Citizens United decision, which lifted restrictions on political advocacy by corporations and unions.

A group of 17 Democratic senators, including Dianne Feinstein of California, wrote to White on January 9 to say that they were "disappointed" that the SEC did not plan to work on a disclosure rule in 2014. In the House, 79 members of Congress, including several California members, sent a similar letter to White on the same day.

Menendez in April introduced the "Shareholder Protection Act" (S. 824), which would:

- Require a majority of shareholders to authorize an overall political budget before general treasury funds could be spent on political activities

- Require a Board of Directors vote to authorize all expenditures of more than $50,000 within the overall budget approved by shareholders

- Require the disclosure of corporate political spending to shareholders, the SEC and the public on a quarterly basis, and online disclosure of board approval of significant expenditures within 48 hours

Rep. Michael Capuano, D-Mass., proposed identical legislation (H.R. 1734) in the House in April. Neither bill has made it out of committee. Menendez and Capuano also unsuccessfully proposed the measure during the previous session of Congress.

Groups Seek Implementation of CEO Pay Disclosure Rule

A pair of advocacy groups are pushing for the Securities and Exchange Commission (SEC) to issue a final rule on CEO pay disclosure.
The 2010 Dodd-Frank Act included a provision that requires publicly-held companies to

disclose the ratio of CEO pay to the median pay of all other employees. The SEC proposed a rule implementing the provision on September 18, 2013. The public comment period ended on December 2, and more than 128,000 comments were submitted, but the SEC has not yet issued a final rule.

On September 19, a year and a day after the proposed rule was released, Americans for Financial Reform and Public Citizen urged the commission to complete work on the rule.

"Investors know that the disclosure of the gap between CEOs and their median employee is a key financial metric," the organizations stated. "Pay ratio disclosure was first proposed in a 1997 paper by James Cotton, a professor of law at the Texas Southern University and a retired corporate lawyer. Disclosure, he argued, would provide an objective standard for measuring the reasonableness of a CEO's pay. ... It's time for the SEC to finalize the rule so investors can see what some corporate executives are still trying to hide."

The proposed rule does not prescribe a specific methodology for calculating the pay ratio. A company's approach 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 proposal is opposed by many business interests, including the U.S. Chamber of Commerce.

CalPERS CEO Anne Stausboll said when the proposal was released that it "further opens the window on CEO pay and will help shareholders to keep management accountable."

The House Financial Services Committee in June 2013 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 of last year, 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."

Mandatory Social Security Coverage Supporter Confirmed as Member of Advisory Board

On September 8, the Senate confirmed three nominees to the Social Security Advisory Board, including a vocal proponent of requiring Social Security coverage for all newly-hired state and local workers.

The chamber approved Henry Aaron, Lanhee Chen and Alan Cohen for the board, a congressionally-created, independent, bipartisan panel that advises the president, members of Congress, and the Social Security commissioner. Chen and Cohen were approved by voice vote, Aaron, who is expected to chair the board, by a 54-43 vote.

Aaron, a senior fellow in economic studies at the Brookings Institution, has frequently backed mandatory Social Security coverage for new public employees, as in a 2011 article in *National Tax Journal*, in which he wrote that, "extending Social Security coverage to all newly hired state and local employees is long overdue." As reasons, he cited the "considerable administrative complexity" that results from the windfall elimination provision – which reduces or eliminates Social Security retirement benefits for individuals who collect pensions from jobs that were not covered by the program – and asserted that "state employees shoulder none of the cost of servicing the legacy debt while they are working outside the system."

"Furthermore, after leaving state employment, they typically will be ineligible for disability coverage for some time, as eligibility for disability insurance requires work in employment covered by Social Security in at least five of the last 10 years," Aaron wrote.

In 2011, President Obama nominated Aaron to chair the Advisory Board, but the nomination stalled amid Republican criticisms of comments that Aaron made regarding the need to ration health care. The GOP still opposes Aaron, with Senate Finance Committee Ranking Republican Orrin Hatch of Utah saying on the Senate floor before the vote that, "the evidence does not convince me that Dr. Aaron would be able to set aside his partisan views and manage the board in a bipartisan fashion that aims at consensus in both analysis and conclusions."

"Throughout much of his writings, Dr. Aaron has, far more often than not, opted for partisanship over sound policy," Hatch said. "This not only makes me question his ability to be bipartisan, it also leads me to question his judgment on policy issues."

House Passes Bill to Allow Insurance Policies that Do Not Meet Minimum Standards

On September 11, the House of Representatives passed legislation that would permit health insurance issuers to continue selling policies that were in effect in 2013, even if those policies do not meet new minimum benefits standards.

The Employee Health Care Protection Act (H.R. 3522), from Rep. Bill Cassidy, R-La., would "grandfather" in group plans that were sold in the year before the benefits standards required by the 2010 Patient Protection and Affordable Care Act (ACA) went into effect on January 1. It passed 247-167. No Republicans voted against it, and 25 Democrats voted for it.

"The president promised time and again if people liked their health care plan they could keep it," House Education and the Workforce Committee Chairman John Kline, R-Minn., said. “But the American people are discovering the president failed to keep his word, leaving them with political gimmicks, cancelled policies, and broken promises. Today, the House passed legislation to allow hard-working Americans to keep the health plans they like, providing workers and small businesses more affordable health care options.”

As a result of the ACA’s minimum benefits provision, insurers in 2013 cancelled policies – numbering in the hundreds of thousands or more, mostly if not entirely in the individual market – that would not meet the requirements. (Although the law contains a grandfather clause, the clause could not be applied if an insurer had made any changes to a policy, even minor ones.) This led to heavy criticism of Obama, who said several times before and after the bill was enacted that, if people liked their insurance, they would be able to keep it.

In November, Obama announced that, under the terms of an executive order he had signed, “insurers can extend current plans that would otherwise be canceled into 2014, and Americans whose plans have been canceled can choose to re-enroll in the same kind of plan.”

He also acknowledged at that time that, “With respect to the pledge I made that, if you like your plan, you can keep it, I think – and I’ve said in interviews – that there is no doubt that the way I put that forward unequivocally ended up not being accurate.”

In a jab at Obama, the main section of Kline’s bill is titled, “If you like your group health insurance plan, you can keep it.”

The legislation now awaits action by the Democrat-controlled Senate, which is unlikely even to vote on it.

On November 15, the House voted 261-157 to pass the “Keep Your Health Plan Act” (H.R. 3350), which would allow insurers to continue to offer individual policies that do not meet ACA standards in 2014 – as long as they were being sold on January 1, 2013 – to new customers as well as existing ones. The Republican-backed bill was supported by 39 Democrats. The Senate has not acted on the bill.

Health Insurance Premiums Show Slow Growth: Kaiser

Annual premiums for employer-provided health insurance rose 2 percent for individual coverage and 3 percent for family coverage from 2013 to 2014, according to a report from the Kaiser Family Foundation and the Health Research and Educational Trust (HRET).

The report, which is based on the results of an annual survey of private and public employers – the first conducted by Kaiser and the HRET since several major provisions of the health care reform law went into effect on January 1 – found that average annual premiums this year are $6,025 for individual coverage and $16,834 for family coverage.

The 2 percent increase for individual coverage is not statistically significant, according to the report.

High-deductible health plans have the lowest average premiums at $5,299 for individual coverage and $15,401 for family coverage. HMO plans have the highest average premiums at $6,223 and $17,383, though PPO plans are only slightly behind at $6,217 and $17,333.

The average worker contribution is $1,081 (18 percent) for individual coverage and $4,823 (29 percent) for family coverage.

The majority of workers – 58 percent – are in PPOs, while 20 percent are in high-deductible plans, 13 percent are in HMOs, and 8 percent are in point-of-service plans.

Although the report found "considerable stability" in the employer-provided health insurance market, it suggested that, "The relatively quiet period in 2014 may give way to bigger changes in 2015," because of the implementation of the employer mandate, which requires all employers with at least 50 employees to offer health coverage that meets certain standards for benefits and affordability. It also noted that a strengthening economy is likely to have an impact on coverage, since, "Costs grew at low levels while the economy struggled, but are likely to rebound if the growth in the economy is sustained."

"The continued implementation of major reforms in the non-group market also may affect employer strategies going forward," the report stated. "For smaller firms not subject to the employer-responsibility requirement, the ability of their employees to receive subsidized nongroup coverage in health insurance exchanges may be an attractive alternative which would relieve the employer of the burden of sponsoring coverage. Small firms that have struggled to offer good coverage options may decide to stop offering now that other alternatives are available. In addition, a quarter of large firms offering retiree coverage to active workers indicated they were considering changes to the way they offered retiree coverage because of the implementation of the public exchanges. We may see shifts in the coverage options offered by some employers in response to these new options and new tax incentives."

Rate of Growth of Health Care Spending to Increase, CMS Officials Conclude

National spending on health care is projected to grow faster than the economy in coming years, but the expected trends are not all bad.

Health spending in 2013 increased by just 3.6 percent over 2012, but annual growth is projected to jump 5.6 percent this year – the first time in six years that it has been more than 4 percent – then average 6 percent from 2015 to 2023 because of the "combined effects of the Affordable Care Act's coverage expansions, faster economic growth, and population aging," according to an article published in *Health Affairs* by several members of the Centers for Medicare & Medicaid Services (CMS) Office of the Actuary.

While this rate of growth would be 1.1 percentage points higher than the country's projected economic growth through 2023 – boosting health care's share of the economy from 17.2 percent to 19.3 percent – it would, the authors noted, be slower than the 7.2 percent annual growth experienced from 1990 through 2008.

"The period in which health care has accounted for a stable share of economic output is projected to end in 2014, primarily because of the coverage expansions of the ACA," the authors concluded. "It is anticipated that by 2017, once the mostly one-time transition effects of expanded coverage have fully transpired, the health share of GDP will increase, albeit at a slower rate than its historical average, as an improving economy and the aging of the baby-boom generation lead to faster health spending growth."

A separate report from the Congressional Budget Office (CBO), meanwhile, indicated that, in the Medicare program, annual spending per beneficiary, when adjusted for inflation, is declining, from $12,000 three years ago to $11,000 this year to, it is projected, even less than that by 2017. The trend is attributed to two factors: reduced use of medical products and services by beneficiaries and the entrance into the program of millions of baby boomers every year. While the latter will likely increase financial stress on the program in the long-term, baby boomers, for now, represent a relatively young and healthy cohort of Medicare beneficiaries that brings down per capita costs.

Court Orders Challengers to Conflict Minerals Rule to Respond to Appeal Request

A federal court on August 28 ordered the U.S. Chamber of Commerce, the Business Roundtable and the National Association of Manufacturers (NAM) to respond to a filing in which the Securities and Exchange Commission (SEC) seeks to appeal a ruling that struck down its conflict minerals rule.

The 2010 Dodd-Frank Act directed the SEC to issue rules requiring certain companies to disclose their use of tantalum, tin, gold and tungsten that originated in the Democratic Republic of Congo (DRC) or an adjoining country. The mandate was an attempt to address human rights violations in the region and the use of mineral sales to finance armed conflicts.

The SEC in August 2012 adopted a rule implementing the disclosure requirement. On April 14, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, in a case originally brought by the Chamber, the Business Roundtable and NAM, struck down part of the rule, concluding that requiring companies to identify their products as "DRC conflict free" or not would violate their free speech rights. The judges, who remanded the case to a lower court, upheld other parts of the rule, though, including filing requirements.

The SEC argued in a May 29 filing that the court should rehear the case en banc once it had decided a separate case involving similar First Amendment issues.

The court directed the three original plaintiffs to submit a joint response to the SEC's filing within 15 days. The judges will presumably make a decision on whether to accept the en banc appeal request at some point after receiving that response. They indicated in the August 28 order that, "Absent further order of the court, the court will not accept a reply to the response."

On July 29, the D.C. Appeals Court, in an 8-3 en banc ruling that affirmed a March decision by a three-judge panel of the court, ruled that a regulation that requires labels on meat products to identify the country of origin and certain other information may be enforced. The American Meat Institute (AMI) and several other trade associations representing the meat industry had argued that the regulation, "by compelling speech in the form of costly and detailed labels on meat products that do not directly advance a government interest," violated their First Amendment rights. They sought an injunction preventing the rule from being implemented, but the court turned down the request.

While case law has established that the government can require commercial disclosures to prevent or correct deception, the court extended the principle in this case and decided that, "'government interests in addition to correcting deception' ...can be invoked to sustain a disclosure mandate."

Critics of the conflict minerals rule will likely note that the majority opinion in the meat labeling case put some emphasis on the rule requiring disclosure of "purely factual and uncontroversial information."

"We also do not understand country-of-origin labeling to be controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy," the opinion stated. "AMI does not suggest anything controversial about the message that its members are required to express."

The court, if it accepts the appeal, may have to decide whether a "DRC conflict free" disclosure is equally uncontroversial and, if it is not, whether that affects the constitutionality of the rule. The panel that struck down the rule in the spring stated that, "At all events, it is far from clear that the description at issue – whether a product is 'conflict free' – is factual and non-ideological."

SEC Adopts Rules for Credit Rating Agencies, Asset-Backed Securities

The Securities and Exchange Commission (SEC) on August 27 adopted rules related to credit rating agencies and asset-backed securities.

The credit rating agency rules, which implement provisions of the 2010 Dodd-Frank Act, establish requirements related to agencies' internal controls, conflicts of interest, disclosure of credit rating performance statistics, procedures to protect the integrity and transparency of rating methodologies, disclosures to promote the transparency of credit ratings, and standards for the training, experience and competence of credit analysts.

Critics say that credit rating agencies bear some responsibility for the financial crisis of the late 2000s because they gave high marks to subprime mortgage-backed securities and other instruments that proved to be deeply flawed and that eventually became nearly worthless, contributing to the economic downturn.

"This expansive package of reforms will strengthen the overall quality of credit ratings, enhance the transparency of credit rating agencies and increase their accountability," SEC Chairman Mary Jo White said. "Today's reforms will help protect investors and markets against a repeat of the conduct and practices that were central to the financial crisis."

The new rules for asset-back securities, which also grew out of Dodd-Frank, require, among other things, loan-level disclosures for certain assets, such as residential and commercial mortgages and automobile loans and more time for investors to review and consider a securitization offering. The rules also revise the eligibility criteria for using an expedited offering process known as "shelf offerings" and modify reporting requirements.

CalPERS applauded the moves by the SEC.

"These new rules will enhance transparency, set up needed firewalls, establish comprehensive internal controls and require greater disclosures," CalPERS Interim Chief Investment Officer Ted Eliopoulos said. "These rules are a step in the right direction to protect America's investors."

Related National and Industry News

Think Tank Proposes Universal Minimum Retirement Plan

A think tank has proposed a "minimum pension" model that would cover nearly all Americans.

Under the terms of the plan from Third Way, a centrist group, employers would be required to contribute at least 50 cents per hour worked into an employee's retirement plan, which would be in the form of either an Automatic IRA Account or, for employers with fewer than 50 employees, a Savings Plan for Universal Retirement (SPUR) Account.

Employees would be auto-enrolled into making their own contributions of 50 cents per hour, but they could change this or opt out of making contributions altogether. The default investment would be a lifecycle fund, with limited other investment choices available, and the accounts would be privately managed and portable, with the tax treatment the same as for IRAs, including penalties for early withdrawals. Retirees would decide how they wanted the funds distributed – in a lump sum or annuity, for example – at age 62.

Employers that already provide retirement plans that meet or exceed the proposal's benefits would not be affected. For those not now providing any retirement plan, the group urged that there be “as few exemptions as possible,” even in the case of very small employers.

The organization suggested that a temporary tax credit be provided – “at a cost of less than $100 billion over 10 years” – to help employers adjust to the new program.

“The nest eggs held in workers’ SPUR or IRA Accounts are their own individual accumulation of and claim to wealth,” the report outlining the proposal stated. “They will be used to maintain a more secure retirement, but this accumulated wealth can also be passed on to children. That would create a chain of wealth and have a major impact on wealth and income inequality.”

California Congressional Delegation News

Oxfam America Sues to Force SEC to Issue Disclosure Rule

Oxfam America on September 18 filed a lawsuit to try to force the Securities and Exchange Commission (SEC) to issue a rule requiring energy companies to disclose payments to foreign governments.

Section 1504 of the 2010 Dodd-Frank Act directed the implementation of the rule in order to increase the transparency of money flowing to regimes in resource-rich nations that may be more likely to pocket it than use it for the good of their people.

After its first rule was struck down in federal court in 2013, the SEC did not include development of a new version of the rule in its original list of priorities for the coming year, but a recently released update to the list projects completion of the rule by March 2015.

Oxfam America, part of an international organization that works on poverty issues, wrote in a July 14 letter to the SEC that the commission is well past the April 17, 2011, deadline for issuing a final rule that implements Section 1504, and that Oxfam members are concerned about “the recent non-binding announcement that the Commission may propose a new rule in March 2015 and strongly believe that this delay is both unwarranted and inconsistent with the Commission’s legal obligations.”

The group warned that it would sue if the SEC did not act by August 1. The SEC took no action on the issue, and Oxfam filed a lawsuit in the U.S. District Court for the District of Massachusetts.

“The SEC’s unlawful failure to promulgate a Final Rule within Section 1504’s 270-day deadline frustrates both of Congress’s objectives,” the lawsuit stated. “It simultaneously denies investors valuable information critical for assessing investment risk and impedes Congress’s plan to empower individuals in resource-rich countries to hold their governments accountable for the management of extractive resource revenues.”

The lawsuit asks the court to "compel the SEC to act promptly to issue a Proposed Rule, and a Final Rule, as required by Section 1504, within a reasonable time thereafter."

"With transactions worth billions of dollars in oil, gas and mining projects taking place in some of the poorest, most corrupt and highest-risk countries in the world, citizens and investors simply cannot wait any longer," Ian Gary, senior policy manager of Oxfam America's extractive industries program, said. "Other markets like the U.K. and France are implementing a European Union law modeled on the SEC's original strong rules before the end of the year, making the Commission's job easier to finish."

In June 2013, the European Union passed a directive requiring its member states to enact disclosure mandates by 2015. The United Kingdom on August 21 released drafts of rules requiring oil and gas companies to disclose payments they make to foreign governments, whether in the form of taxes, royalties, permit fees, etc., starting January 1, 2015. Noncompliant companies could face criminal penalties. The proposed regulations are expected to be introduced to Parliament for its approval this year.

Oxfam America filed a lawsuit in May 2012 demanding that the SEC issue a Section 1504 rule. Three months later, the commission released the rule that was later struck down in a case brought by the American Petroleum Institute, the U.S. Chamber of Commerce, the National Foreign Trade Council and the Independent Petroleum Association of America. The commission's analysis of the rule's potential impact, the judge concluded, "was arbitrary and capricious and independently invalidates the Rule."

Royal Dutch Shell and Exxon Mobil wrote to the SEC on May 1 to ask the commission to make development of the U.S. rule a priority this year in the hope that the U.K. would postpone its implementation until 2015, so that it could take the SEC approach into account. This, the companies wrote, would be "especially important for purposes of 'equivalency' between the EU and U.S. reporting regimes."

Critics, however, say that energy companies are less interested in equivalency than in "playing both sides off against each other" in order to weaken and slow implementation of any rule.

In June, 58 Democrats signed on to a letter organized by House Financial Services Committee Ranking Democrat Maxine Waters of California that advised SEC Chairman Mary Jo White that, "we believe that the rulemaking for section 1504 should be on a swifter, more definite time line. We strongly urge you, therefore, to issue a proposed rule for public comment no later than the end of this year."

Sen. Barbara Boxer, D-Calif., signed on to a May 1 letter from 13 senators – 12 Democrats and one independent who caucuses with them – to White urging the commission to "prioritize the issuance of a new rule for Section 1504 by 2015."

CalPERS, in February 2011, wrote to the SEC to support the rule, which was then under consideration by the agency, stating that it "is especially vital for companies operating in countries where governance is weak resulting in corruption, bribery and conflict that could negatively impact the sustainability of a company's operations and our ability to more effectively make investment decisions."