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Congress Wraps Up 2019 with Bill Enacting SECURE, Other NAIFA Priorities

It finally happened! On December 19, Congress wrapped up 2019 by passing legislation (H.R.1865) that enacted the SECURE Act, repealed the Health Insurance and Cadillac taxes, extended the National Flood Insurance Program (NFIP) and the Terrorism Risk Insurance Act (TRIA), and funded the government for the rest of FY 2020. President Trump signed the measure into law on December 20.

Long a top priority for NAIFA, the SECURE Act, among other things, removes impediments to multiple employer plans (MEP), requires employers to illustrate estimates of monthly income for life, based on current account balances, eases rules governing use of annuities in qualified plans, adds new discrimination rule safe harbors to allow more retirement saving, delays imposition of required minimum distribution (RMD) rules to age 72, allows contributions to traditional IRAs by people still working after normal retirement age, and modifies rules for "stretch IRAs" that is restrictive and will require review of current financial plans that include stretch IRA techniques. Details are in the GovUpdate sent to NAIFA members on December 22, 2019.

H.R.1865 also repealed three Affordable Care Act (ACA) taxes—the health insurance tax (HIT), a tax on health insurers that has been described as a kind of sales tax that would increase the cost of health insurance; the Cadillac tax, a levy on health insurance plans with premiums that exceed a statutory maximum—the tax would have been 40 percent of the premium amount that exceeded the maximums allowed; and the Medical Device Tax. Also in H.R.1865 were rules that extend for one year the above-the-line deduction for unreimbursed medical expenses to the extent they exceed 7.5 percent of adjusted gross income (AGI); a one-year extension of the tax credit for paid family leave; an extension through September 30, 2020, of the NFIP; and a seven-year extension of the Terrorism Risk Insurance Act (TRIA).

H.R.1865 did not include a solution to the surprise billing issue or any rules aimed at controlling the cost of prescription drugs. However, the new law does include a May 22 expiration date (for funding certain government health programs) that was designed to create a deadline for action on surprise billing and prescription drug cost control issues.

Prospects: Enactment of H.R.1865 sets up several issues for 2020. First, financial advisors must learn and then implement the new retirement savings rules—which will create substantial new opportunities for NAIFA members and their employer clients. NAIFA plans a webinar to provide education on the details of these new rules, including addressing concerns about the new stretch IRA rules, and the implementation challenges of the 1-1-2020 effective date of most of the provisions. In addition, Congress will have to act later this year to extend –and perhaps reform – the

NFIP. The medical expense deduction expires again on September 30, 2020, so Congress must address that issue again this year.

NAIFA Testifies on Massachusetts Fiduciary Rule Proposal

On January 7, NAIFA CEO Kevin Mayeux testified on behalf of NAIFA and NAIFA Massachusetts before a hearing in Massachusetts on that state's pending proposal to impose a fiduciary standard of conduct rule on all financial advisors. NAIFA was one of 12 industry groups who testified in opposition to the proposal. Over 20 NAIFA Massachusetts members also attended the hearing.

Mayeux pointed out that as currently written, the Massachusetts fiduciary rule proposal would reduce consumer choice and increase consumer costs, particularly in the middle market that most NAIFA members serve. He said NAIFA has significant concerns about the proposal. "If regulators pick winners and losers in the marketplace in this manner," Mayeux said of the proposal, "the result will be an increase in consumers' costs and a decrease in consumer choice."

Mayeux also said, "NAIFA has "significant concerns that the proposal if adopted, will negatively impact the ability of small and mid-market consumers — who make up a majority of our members' clients — to access financial products and professional advice, guidance and service. Why? "Because the proposal favors a fee-based, advisory business model over a commission-based brokerage model."

The Massachusetts plan's "bias towards a fee-based advisory model is due to, among other things, the broad and vague way the proposal addresses conflicts of interest; the requirement that covered persons make recommendations 'without regard to the financial or other interest of any party other than the customer or client'; and the increased compliance costs and responsibilities that will result from the proposal's fiduciary duty and its ongoing obligations," Mayeux continued. If adopted in its current form, the proposal "will likely lead to large numbers of broker-dealers and their registered representatives changing their business practice from a commission-based brokerage practice to a fee-based business model." A fee-based advisory model, Mayeux argued, "is often more expensive to consumers over the long run."

In addition to its own testimony, NAIFA joined with 11 other brokerage and insurance trade groups in a letter to Massachusetts Secretary of the Commonwealth William Galvin. The joint letter opposed the Galvin proposal and explained why it should not be implemented.

The Galvin proposal would "deem it unethical or dishonest conduct or practice for a broker-dealer, agent, investment adviser or investment adviser representative registered in Massachusetts to fail to act in accordance with a fiduciary duty to any customer or client."

Adding to the united industry opposition was SIFMA president and CEO Kenneth E. Bentsen, Jr., who argued that Massachusetts should defer to the Securities and Exchange Commission (SEC)

Regulation Best Interest (Reg BI). Reg BI takes effect June 30, 2020. He asked that Massachusetts delay its decision-making on this issue until after Reg BI is fully implemented and the SEC, FINRA, and state regulators have had enough time to examine firms to see if they're in compliance with the Reg BI rules. "Reg BI has meaningfully raised the bar for financial professionals," Bentsen said. "We are very concerned that the proposal exceeds the state's authority, will diminish investor access to advice, products, and services, and will increase investor costs."

Susan Neely, ACLI president, and CEO, also added that an across-the-board fiduciary standard would make it more difficult for Main Street investors to get assistance. "The Massachusetts fiduciary rule is elitist because it would make it harder for low and moderate savers to access guidance," Neely pointed out.

Prospects: There is considerable concern that Massachusetts will move ahead with this ill-advised fiduciary rule despite the united opposition from industry experts. NAIFA and NAIFA-Massachusetts are working hard to fight the proposal.

Prospects for Federal Legislation during This Election Year

Election year politics will follow hard on the heels of the Senate trial (acquittal expected) of the House-passed articles of impeachment. Thus, topline politics will dominate legislative activity in 2020. Still, there will be legislation proposed (even though most of it will not be enacted into law). Here is an early list of issues of interest to NAIFA members that are likely to take center stage on Capitol Hill this year.

Retirement Savings: New rules to incentivize retirement savings, both on an individual level and through employer-sponsored plans, are a priority of House Ways & Means Committee Chairman Rep. Richard Neal (D-MA). The author of the recently enacted SECURE retirement savings bill has put out a call for more ideas to improve retirement savings rules.

Rep. Neal is particularly interested in an automatic-enrollment 401(k) plan, and in more opportunities for tax-preferred retirement savings. He is working with the committee's ranking member, Rep. Kevin Brady (R-TX), on what he calls his "2.0" retirement savings bill. The new proposal is likely to be released in the upcoming months, possibly before spring. NAIFA is working with Reps. Neal and Brady on this initiative.

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The PRO Act: The Protecting the Right to Organize Act (the PRO Act), H.R.2474, is a partisan initiative. It is a labor reform bill that, among other things, reforms the test of when a worker is an independent contractor versus an employee. The bill, as written, would have a serious adverse impact on financial advisors who are not employees of their companies. NAIFA, working in collaboration with insurance companies, is seeking an amendment to the bill that would clarify that a company's insurance agents, due to the special circumstances of their work, should not be included in the new independent contractor versus employee test. California, whose law is the model/basis for the PRO Act provision in question, recognized this and exempted insurance agents from its law.

The House Education and Labor Committee favorably reported H.R.2474 on September 25, but the bill still awaits a vote by the full House. It is expected that the House will approve the bill. Its fate in the Senate is still undetermined, but most Washington experts believe the bill does not have the proverbial snowball's chance in Hades of passing the GOP-controlled Senate. But it is likely to be a prominent issue in the presidential campaign—as of now, all the candidates for the Democratic nomination for President support the bill. And union participation in the November 20020 elections is near-certainly going to be vigorous.

NFIP: Current authority and funding for the National Flood Insurance Program (NFIP) expires September 30, 2020, and so efforts to reform the program, and fund it for five or six years into the future, will continue this winter, spring and summer. Last year, there was some progress towards a consensus reform approach to flood insurance, and so Washington insiders are hopeful that this will be the year that Congress can agree on a reformed program and enact at least a five-year NFIP rule.

Health Reform/Affordable Care Act (ACA): Health reform is widely expected to be among the most hotly-debated issues of 2020, both on the campaign trail and in Congress. There may be a court ruling as to the constitutionality of the ACA later this year—and if the Supreme Court rules (as an appellate court and a district court have done) that the ACA and/or its individual mandate are unconstitutional, the debate over health reform will get even hotter.

Absolutely everyone—even including the most conservative Republicans—wants the ACA's ban on preexisting conditions as a factor in availability or price of health insurance to continue, even if its current legal status falls on the grounds of ACA unconstitutionality. Similarly, other ACA insurance reform provisions—e.g., the rule that health insurance must allow parents to insure their children up through age 26, annual and lifetime benefit caps, and others—have considerable bipartisan support. If the ACA falls on constitutional grounds, however, these provisions will have to be reenacted into law.

On top of the ACA-specific issues, the question of whether the U.S. should move towards a universal health care system—whether government-run in its totality or as an option available to all (e.g., Medicare-for-All or Medicare-for-All-Who-Want-It)—looks like it will be among the top presidential and Congressional campaign issues this year. While it is unlikely that Congress will enact any kind of universal health care system this year, it is virtually certain there will be more hearings—and possibly more legislative proposals—on tap throughout the year.

There has already been one hearing on some nine proposals aimed at achieving universal coverage, including Medicare-for-All and Medicare-for-All-Who-Want-It, on December 11 at the House Energy & Commerce Committee. The hearing shone a spotlight on the lack of consensus on what to do about increasing coverage and controlling health care costs. And it signaled a continuation of this ongoing debate throughout this election year.

Paid Leave: A range of paid sick and family leave bills are pending. Both Democrats and Republicans want to enact a federal paid leave benefit, but the "how" of such a benefit remains something on which agreement is proving elusive. Some of the bills include both paid sick time and paid time off to care for a new baby (including via adoption). The structure of the benefit ranges from an insurance-type program into which employees pay, and into which employers may pay, to a mechanism by which new parents can borrow from future Social Security benefits. Also, newly on the table is a bipartisan bill introduced by Sens. Bill Cassidy (R-LA) and Kyrsten Sinema (D-AZ) that would allow new parents to advance up to $5,000 of the child tax credit in the year a child is born or adopted.

The House Oversight Committee held a hearing on "the need for comprehensive national paid family and medical leave" on December 10. There, witnesses—including some of the bills' sponsors—noted that the U.S. is one of only two nations in the world that does not provide any form of paid leave and that here in the U.S. even unpaid leave is available to fewer than 60 percent of American workers, many of whom cannot afford to take it. The hearing could be a portent of legislative activity to come in 2020.

The effort is bipartisan, but disagreement on how to pay for the benefit could cause the initiative to falter in this highly-charged political atmosphere. But it is already a campaign issue, so expect at least debate, and possibly legislative action on it this year.

Taxes: There's a good chance there will be a tax bill in 2020—driving the effort will be a pressing need to correct errors in the Tax Cuts and Jobs Act (TCJA), enacted in late December 2017, and the need to again extend expiring tax rules like the deduction for unreimbursed medical expenses. Another tax issue that looks like it may "grow legs" is a proposal that would allow health savings account (HSA) funds and/or retirement funds to be used to pay for long-term care or long-term care insurance.

How extensive the tax bill may be will depend on many factors, including the burgeoning federal deficit. While concern about the deficit is at a low level currently, the most recent Congressional Budget Office (CBO), projections suggest that may change sooner rather than later. CBO is projecting an increase in the deficit of $39 billion—a rise of 12 percent—in the first three months of 2020. The seven percent spike in spending/outlays overwhelmed the five percent increase in revenue collected, CBO said. If, in fact lawmakers become concerned, that will influence whether TCJA corrections will have to be offset and whether lawmakers will agree to raising new revenue through tax hikes.

Both corporate and individual tax rates, special tax rules like the deduction for pass-through business income, and estate tax rules will certainly be debated, even if ultimately no changes to current law rules are agreed to this year. And those debates will influence next year's tax legislation, too. So, timing is uncertain, although if history is any guide, it's more likely than not that if there is a tax bill this year, it will start to develop relatively early in the year but won't get actual legislative action until late in the year, perhaps even after the November elections.

As NAIFA members know, any time lawmakers turn their attention to raising revenue through tax increases, there is a certain look at tax expenditures—tax rules that result in the government not collecting tax on otherwise taxable transactions. Those tax rules include literally trillions in issues that impact life and health insurance, annuities, retirement savings, and employer-provided benefits. So, a tax bill aimed at raising revenue—or offsetting extended or new tax breaks—means NAIFA issues will likely be at risk.

Prospects: As noted, chances are that most legislative initiatives will stall in this increasingly divided and partisan political environment. But if history is any guide, some bills—we just don't know which ones at this point—will be enacted into law, so NAIFA must and will be prepared.