DODD-FRANK REFORM 2.0

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Recent activity in Congress suggests that the return from the July 4th recess will see a continued push to reform the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") before year's end. This alert provides an overview of the current state of play and the most likely outcome.

DODD-FRANK REFORMS TO DATE

On May 24, 2018, President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act (S. 2155; Pub. L. No. 115-174). Although the passage of S. 2155 marks a milestone in revising Dodd-Frank, it was narrowly tailored to maintain the bipartisan support necessary for Senate passage. As discussed in The Dodd-Frank Reform Endgame, S. 2155 was just one of several complementary, ongoing reform efforts. These ongoing efforts include the various provisions advancing through the House Financial Services Committee ("HFSC"), the provisions included in the House's appropriations bill, and the recommendations still to come from the fourth and final Treasury Report pursuant to President Trump's Executive Order 13772.

For additional information on the HFSC's reform efforts, please see the K&L Gates Alert entitled "Dodd-Frank Reform; What Comes Next?" For additional information about S. 2155, please see the K&L Gates Alert entitled "Dodd-Frank Reform Efforts Intensify." For additional information about the Trump Administration's reform agenda, please see the K&L Gates Alert entitled "Treasury Reports Continue to Inform Dodd-Frank Reform Efforts."

LEGISLATIVE REFORM CONTINUES

HFSC Chairman Jeb Hensarling (R-TX) continues to advance various provisions, many of which were originally contained in the "Financial CHOICE Act" (H.R. 10). Although that bill contained some controversial provisions, many—if not most—of these ideas enjoy at least some degree of bipartisan support. In order to emphasize (or to determine) the degree of bipartisan support, a number of these provisions have been considered as individual bills and have been reported favorably by the HFSC. Many of these bills have also passed the full House with bipartisan support.

Notably, Senate Banking Committee Chairman Mike Crapo (R-ID) has recently held hearings on capital formation issues, many of which mirror those being considered in the House. We expect to see additional HFSC and Senate Banking markups in the near term. Moreover, Senate Majority Leader Mitch McConnell (R-KY) recently announced that the Senate is foregoing its usual August recess, which may buy more time to consider such proposals.

These parallel House and Senate efforts are focused primarily on capital formation proposals that collectively are being referred to as a "JOBS Act 3.0" package. The stated objective is to pass the package through the House in July, with Senate consideration to follow.

FORECASTING JOBS ACT 3.0 PROVISIONS

Earlier this year, Chairman Hensarling released a list of 29 House bills that he wanted included in S. 2155. Ultimately, the House passed S. 2155 without modification, so this list is the presumed starting point for provisions that might be included in whatever package ultimately is assembled. At least 17 of those bills have already passed the House with more than two-thirds support or have been reported favorably by the HFSC with more than 50 votes. We expect that such a high degree of bipartisan support will be necessary to garner sufficient support in the Senate to become law. These 17 bills cover a broad range of issues, such as definitional clarifications within federal securities law, expansion of the definition of "accredited investor" and the ability to use confidential draft registration statements, exemptions for brokers in connection with small business mergers, and streamlined mortgage disclosures.

Several of these bills received nearly unanimous support in the HFSC and the full House, including the "Fair Investment Opportunities for Professional Experts Act" (H.R. 1585) and "Encouraging Public Offerings Act of 2017" (H.R. 3903), both of which amend the Securities Act of 1933. The first would codify the qualifications necessary to be an accredited investor and the second would expand the use of confidential draft registration submissions. The "Family Office Technical Correction Act" (H.R. 3972) would further clarify the definition of an accredited investor. The "Market Data Protection Act" (H.R. 3973) would require entities to develop stronger risk control mechanisms to safeguard data storage. The "Financial Institution Living Will Improvement Act" (H.R. 4292) would reform Dodd-Frank's living will process, respectively. Finally, the "Small Business Access to Capital After a Natural Disaster Act" (H.R. 4792) would require the Securities and Exchange Commission's Advocate for Small Business Capital Formation to assess capital limitations unique to disaster areas. Additional broadly bipartisan House bills include the "Small Business Capital Formation Enhancement Act" (H.R. 1312), the "Family Self-Sufficiency Act" (H.R. 4258), and the "Expanding Investment Opportunities Act" (H.R. 4279).

Additional prospects can be found in House bills that are related to elements of S. 2155 but that were not fully addressed in S. 2155. For example, the "Volcker Rule Regulatory Harmonization Act" (H.R. 4790) had two key sections. One section would consolidate rulemaking authority under the Volcker Rule to the Federal Reserve Board and the other section would create an exemption from the Volcker Rule for smaller banks. S. 2155 created the exemption, but it did not consolidate rulemaking authority. Given the strong bipartisan support for H.R. 4790 in the House, we expect further consideration of the consolidation provision.

APPROPRIATIONS BILLS

More than a dozen broadly bipartisan House proposals are included in the House version of the FY '19 Financial Services and General Government ("FSGG") Appropriations Bill. These measures would expand the scope of annual exams for the Nationally Recognized Statistical Rating Organizations, enable certain closed-end funds to be considered "well-known seasoned issuers," and require the creation of internal risk control mechanisms with respect to market data. Two such bills were also included in the House version of the FY '18 FSGG Appropriations Bill (which was not enacted): The "HALOS Act" (H.R. 79), which would clarify how "general solicitation" is defined in federal law, and the "Financial Institution Customer Protection Act" (H.R. 2706), which would impose requirements upon the federal banking agencies when taking certain actions, such as ordering a depository institution to end a customer account or to issue a subpoena under the Financial Institutions Reform, Recovery, and Enforcement Act.

THE LEGISLATIVE ENDGAME

Enactment of S. 2155 will likely prove to be the first step in a multi-year process to revisit, refine, and reform Dodd-Frank. Dozens of additional House measures enjoy bipartisan support, as well as meaningful legislative history, which make them viable for enactment in the current Congress. That said, the number of legislative days are dwindling and the demands on Senate Floor time are extraordinarily high. Although it is still possible for both Chambers to consider a package of proposals, pass them in identical form, and present them to the President for signature (either before or after the election), experience suggests that inclusion of bills with the broadest support in an omnibus appropriations bill or other "must pass" legislation is more likely. The fact that even supportive Senate Democrats have expressed a strong desire to avoid another Senate vote on Dodd-Frank reform this year reinforces that possibility. Importantly, there is recent precedent for such an approach. In March 2018, the Small Business Credit Availability Act (H.R. 4267), which revised the regulation of business development companies, was enacted via an omnibus spending package.

Any such process will likely involve negotiation at the Congressional Leadership level to determine which provisions will be included. As is always the case in such scenarios, stakeholders will need to be particularly attentive to late-breaking and likely fast-moving developments. Whatever the outcome this year, it is clear that these efforts will set the stage for further bipartisan revisions to Dodd-Frank in the years ahead. The K&L Gates global financial services policy team is available to assist interested stakeholders wishing to engage in the debate related to these reform efforts.

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