Dodd-Frank: Change on the Horizon?

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Insured Retirement Institute (IRI)

- Leading association for retirement income industry and only association representing the entire supply chain of insured retirement strategies.

- Advocate for sustainable retirement solutions Americans need to help achieve a secure and dignified retirement.

- Members include major insurers, asset managers, broker-dealers/distributors, banks, solution providers and more than 150,000 financial professionals.

- Provide consumer education and outreach efforts to promote the value of retirement income planning.

- Raise consumer knowledge of retirement income strategies through public engagement campaigns, including National Retirement Planning Week and Retire on Your Terms website.
The Dodd Frank Act

- The **Dodd-Frank Act** (the Dodd-Frank Wall Street Reform and Consumer Protection Act) was enacted July 2010.
- Passed as response to the financial crisis of 2008.
- Significantly changed federal financial regulatory processes to limit risk by enforcing transparency and accountability.
- Affected all federal financial regulatory agencies and almost every part of the nation's financial services industry.
- Provisions important to retirement income industry
  - Authorized the SEC to study the standards of care that apply to broker-dealers and investment advisers who provide personalized investment services.
  - Revised certain powers and structures of the SEC.
The Financial Choice Act
(H.R.10-115th Congress)

▪ The **Financial CHOICE Act** stands for Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs – passed the House in June 2017.

▪ Rolls back many Dodd-Frank Act provisions and includes a number of other Republican sponsored bills that had been previously introduced but not enacted which would:
  - Reform SEC Enforcement with Enhanced Penalties
  - Facilitate Capital Formation for Small Businesses, Innovators and Job Creators
  - Provide Regulatory Relief for Main Street, Financial Institutions, Investors and Retirement Savings
Dodd Frank Reforms in the Financial CHOICE Act and the Retirement Income Industry

- Repeal of the DOL Fiduciary Rule & Guidelines for the Establishment of Uniform Standard of Care by the SEC
- Senior Safe Act
- SEC Enforcement Provisions
Repeal of the DOL Fiduciary Rule & Guidelines for the Establishment of an SEC Uniform Standard of Care

**Dodd-Frank Act - Section 913**

- Authorized the SEC to study the standards of care that apply to broker-dealers and investment advisers who provide personalized investment services.

- Study would examine whether:
  - A uniform fiduciary duty on financial intermediaries who provide similar advisory services should be imposed;
  - There are legal or regulatory gaps in standards in the protection of retail customers relating to the standards of care for various financial intermediaries;
  - Use of mandatory arbitration should be prohibited or limited; and
  - Disclosures should be required for broker dealer who sells only proprietary products.
Repeal of the DOL Fiduciary Rule & Guidelines for the Establishment of Uniform Standard of Care by the SEC

Financial CHOICE Act - Section 841

▪ Invalidates the DOL Fiduciary Rule until such time as after the SEC issues its own rule relating to the standards of conduct for brokers and dealers.

▪ Calls for DOL to coordinate with the SEC before undertaking any further rulemaking regarding the conduct of broker and dealers in the management of retirement accounts.

▪ Imposes additional regulatory, analytical and economic analysis requirements on the SEC prior to any rulemaking including studying whether:

  ▪ Retail investors are being harmed because broker-dealers are subject to different standards of conduct than those applicable to investment advisers;

  ▪ Alternative remedies will reduce any confusion/harm to retail investors due to there being different standards (e.g., simplifying the titles used by brokers, dealers and investment advisers); and enhancing disclosure surrounding the different standards of conduct;

  ▪ The adoption of a uniform fiduciary standard would adversely impact the commissions of brokers and dealers, the availability of proprietary products offered by brokers and dealers and the ability of brokers and dealers to engage in principal transactions with customers; and

  ▪ The adoption of a uniform fiduciary standard would adversely impact retail access to, or the availability of, personalized and cost-effective investment advice and recommendations about securities.
Senior Safe Act

Financial CHOICE Act – Subtitle R

- Same as Senior $afe Act of 2017 (S.223) introduced by Senator Susan Collins (R-Maine) and Senator Claire McCaskill (D-Missouri).
- Improves protections for seniors from financial exploitation.
- Promotes and encourages financial services professionals to identify and report “red flags” of potential exploitation to appropriate governmental authorities who can help stop it.
- Provides immunity from any civil or administrative liability for financial services employees arising from a report of any suspected exploitation provided they exercised due care, and that reports made in good faith.
- Mandates training of certain employees on how to spot and report predatory activity in order to trigger the immunity for reporting the suspicious activity.
- Requires the content of the training to be maintained by the financial institution and made available to SEC and state regulators.
- Does not preempt or limit any state law that provides a similar or greater level of protection against liability.
Other SEC Enforcement Provisions – Title VIII

- **Rulemaking by Enforcement - (Section 819)**
  - Provides that no person may be subject to an enforcement action under the securities laws and rules unless that person has had adequate notice of the securities law or rule under which the SEC brings the action.
  - To provide adequate notice, the SEC would have to approve the guidance or statement that is the subject of the enforcement action prior to the time the person engaged in the allegedly violative conduct.

- **Enforcement Manual and Report – (Section 819)**
  - Requires the SEC to publish an enforcement manual and an annual enforcement report outlining the SEC’s enforcement priorities.
Other SEC Enforcement Provisions – Title VIII

- **Wells Notifications - (Section 821)**
  - Provides a party that receives a Wells notification the opportunity to appear with counsel before the SEC staff regarding their recommendation to bring an enforcement action.
  - A Wells notification which is the letter that the SEC sends to people or firms when it is planning to bring an enforcement action against them.

- **Administrative Adjudication - (Section 823)**
  - Provides respondents in SEC administrative proceedings the right to remove an enforcement proceeding to federal court.

- **Limiting the SEC’s Subpoena Power - (Section 826)**
  - Limits the duration of an SEC “omnibus order of investigation,” which is an order issued by the SEC authorizing the SEC to issue subpoenas to multiple people in connection with an investigation.
Other SEC Enforcement Provisions – Title VIII

- **Closing Investigations - (Section 826)**
  - Requires the SEC to establish a process for determining in a timely manner whether to bring a formal proceeding in connection with an investigation, and informing a party under investigation that it does not intend to bring a formal proceeding.

- **Disqualifications - (Section 827)**
  - Provides that the SEC may disqualify a party that has committed certain offenses from using an exemption or engaging in an activity if the SEC provides the party notice and holds a hearing regarding its decision to disqualify.

- **Confidentiality of Records - (Section 829)**
  - Prohibits the SEC from disclosing records it obtains from foreign securities authorities or law enforcement if the records are considered confidential in such country.
Other SEC Enforcement Provisions

- **Investment Company Act of 1940 Section 36(b) Litigation - (Section 831)**
  - Provides that plaintiffs in 36(b) litigations must plead with particularity facts that establish a claim for breach of fiduciary duty.
  - Raises the burden of proof on the plaintiff in a 36(b) action to show a breach of fiduciary duty by “clear and convincing evidence”.

- **Civil Money Penalties and Disbursement of Settlement Proceeds - (Section 216)**
  - Increases the overall amounts the SEC may pursue in civil money penalties.
  - Requires the Comptroller General to submit a report to Congress reviewing how the SEC has used its authority to impose civil money penalties since June 1, 2010.
  - Prohibits agencies from directing funds from an enforcement settlement to non-victims (Section 393).

- **Judicial Review of Agency Actions - (Section 341)**
  - Repeals the *Chevron* doctrine and requires reviewing courts to determine the meaning or applicability of the terms of an agency action.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

- Passed in the House - odds that the act will pass through the Senate in one piece are not looking good.
- Although some Democrats recognize problems with Dodd-Frank – there is unified opposition to most of provisions included in the Choice Act and will not support enacting the full bill as is.
- Lack of bipartisan support makes it extremely difficult to pass through Senate where 60 votes needed for cloture and a vote on the bill.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

- Too early to identify what will be viable in the near term or what may be viable in the longer run and what has no real prospect for enactment.

- Some provisions may have a chance of passing if the Senate considers the House bill in pieces.

- Possibly some of the regulatory relief proposals and Senior $afe Act are ones that could pass.

- Most likely path - Senate will have its own bill, which will require support from some Democrats, then the bill could go to conference with the House and see what comes out of the conference from both CHOICE Act and Senate bill.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

FY 2018 Appropriations Bill

- Another opportunity may present itself through the Financial Services and General Government FY 2018 Appropriations Bill.
- House Appropriations Committee approved the bill but not yet considered in the Senate.
- House bill included several provisions of the Financial CHOICE Act and there is a chance the bill could be folded into a larger omnibus appropriations bill.
- The Congressional Budget Office (CBO) estimates it would reduce the deficit by $33.6 billion over 10 years.
- CHOICE Act provisions in the bill have higher likelihood of passage in an omnibus because it is a bill that becomes a “must pass” legislative vehicle.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

DOL Fiduciary Rule Repeal

- Bills to repeal the Rule in addition to Section 841 of the Financial CHOICE Act.
  - Affordable Retirement Advice for Savers Act (H.R. 2823)
  - Affordable Retirement Advice Protection Act (S. 1321)
  - FY 2018 Labor HHS Education Appropriations Bill

- Chances of repealing the Rule legislatively - very low as Democrats in the Senate will not support it so long as the Rule is in effect.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

DOL Fiduciary Rule – RFI

- Rule may change regulatorily.
- President has directed DOL to examine Rule.
- July 6th - DOL issued an RFI to obtain input from the public about possible rescission, changes or modifications to the Rule and whether the pending applicability date of January 1, 2018 for provisions not yet in effect should be extended.
- In announcing RFI - Secretary Acosta stated he wants to use SEC expertise in this process.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

SEC – Standard of Care RFI

- June 1st - SEC Chair announced an RFI seeking public input to examine the standards of conduct applicable to investment advisers and broker-dealers in dealing with retail investors.

- The input sought will serve to advance and inform the SEC's assessment of potential future actions.

- Chair Clayton is seeking clarity and consistency from the RFI on this issue as it is an area that could be overseen by more than one regulatory body.
Outlook for Passage of Dodd Frank Reforms in Financial CHOICE Act

NAIC - DOL Fiduciary Rule - Standard of Care

- NAIC has formed a working group to examine raising the standards contained in its model suitability standard to a best interest standard.

- Ensuring coordination and collaboration is critical now as the DOL, SEC, NAIC examinations begin.

- Objective should be the development and execution of an effective oversight and regulatory framework to protect consumers and their access to affordable financial advice.