Congressional Outlook 2016: Banking

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***Law360's Expert Analysis congressional outlook series** highlights key areas to watch during this election year, featuring commentary from law firm public policy practice leaders, academics and former members of Congress.*


Marc Lampkin

Despite the proverbial talk of Washington gridlock, more bills (both ceremonial and substantive) were enacted into law during the first session of the 114th Congress than in either 2013 or 2011. Funding deadlines and lapses in law drove legislative activity early on, as the new Congress passed a Terrorism Risk Insurance Act reauthorization in its first two weeks. Legislating accelerated in the last quarter of 2015 with enactment of a two-year budget deal, debt ceiling extension, multiyear highway bill, omnibus appropriations measure, and $600 billion tax extenders package.


John Sonsalla

The prospects for similar bipartisan deal-making this year have diminished with fewer “must pass” bills on the horizon. We can all but guarantee that the recent trend — whereby the second session of each Congress is more productive than the first — will not hold true in 2016. However, this year will be far from uneventful for the financial services sector.

At a minimum, regulators will continue executing aggressive enforcement and rulemaking in the post Dodd-Frank Act era. While the conversation on market instability and systemic risk is ongoing, many of the high-profile rules in the pipeline for 2016 had little (or nothing) to do with the root causes of the economic collapse. Regardless, if history is any indication, expect rulemaking activity to only ramp up in the months ahead as the “Cinderella effect” takes hold, a term coined to describe the typical end-of-administration rulemaking barrage before the clock strikes midnight.

Chief among the regulations on the docket is the U.S. Department of Labor fiduciary rule, which is expected to be released this spring. The DOL sent its final rule to the Office of Management and Budget in late January. The OMB’s review process can last up to 90 days but most expect it to take only half that time. While the final rule is sure to draw a legal challenge, it is also one of the — if not the — top regulations Republicans are seeking to roll back. While there is support among some Democrats for legislative intervention, efforts to block the rule in its entirety will face an uphill battle as this is viewed as a legacy item for the president.

The Consumer Financial Protection Bureau — now with nearly five years under its belt — will be among the most active regulators in 2016, finalizing regulations that range from prepaid cards to mortgage servicing standards. It will also propose new limits on payday loans and designate “larger participants” in the market of consumer installment loans and vehicle title loans. The rule with the broadest, crossCongressional Outlook 2016: Banking - Law360 Page 1 of 2 https://www.law360.com/articles/758249/print?section=banking 2/24/2016 industry impact could be a proposed ban on mandatory arbitration clauses, which is expected in the first half of 2016. Other potential actions are possible on debt collection, checking account overdraft, consumer credit reporting, and student loan servicing.

The CFPB's supervision and enforcement agenda will be equally high-profile and no less controversial. The bureau has received scrutiny for looking into college accreditation and bipartisan backlash for enforcement actions in the indirect auto finance sector. Legislation aimed at forcing the CFPB to rescind its guidance overwhelmingly passed the House in November. However, efforts to structurally reform the bureau, including moving it to a five-member commission and bringing its funding under appropriations, are unlikely to succeed before the election.

The U.S. Securities and Exchange Commission is also looking to advance a number of rules this year, including several required under Dodd-Frank. The list includes the "pay versus performance" rule, which will force companies to compare top executive pay with overall company performance, as well as a rule requiring publicly traded companies to disclose whether employees or board members can hedge against decreases in the value of compensation provided by the company. The SEC is also working toward proposing its own fiduciary rule in the fall, though most believe it is unlikely to happen this year.

These and other regulatory activities will give Congress plenty to chew on. House Financial Services Chairman Jeb Hensarling, R-Texas, and his Republican committee colleagues could tackle these issues in a comprehensive fashion, as they are said to be considering a Dodd-Frank "repeal and replace" package. That effort would fit with House Speaker Paul Ryan's, R-Wis., vision of putting forward bold ideas from the party. However, the committee will still continue moving stand-alone bills on individual policy issues. To that end, Hensarling has a better relationship with Ryan than the previous speaker, which could give him more opportunities to bring legislation to the floor. Onlookers will see less activity in the Senate Banking Committee, at least until Chairman Richard Shelby, R-Ala., moves past his March 1 primary. Even after, the broad regulatory relief package he unveiled last year remains bogged down amid objections from Democrats.

The likelihood of Congress successfully legislating in this area turns on whether Republicans and Democrats agree to take limited wins where there is agreement, though even these small victories could be hampered by election-year politics. That said, issues ripe for bipartisan legislating include, among others, providing regulatory relief to regional banks — specifically, raising the $50 billion threshold for classification as a systemically important financial institution, lifting leverage restrictions on business development companies, rolling back the CFPB's auto-finance guidance (as mentioned above), and preserving captive insurance companies' access to the Federal Home Loan Bank system — after the Federal Housing Financial Administration proposed a final rule in January to bar them from membership.

—By Marc Lampkin and John Sonsalla, Brownstein Hyatt Farber Schreck LLP

Marc Lampkin is the managing partner of Brownstein's Washington, D.C., office, co-chairman of the firm's government relations department and former general counsel for the House Republican Conference. He is a veteran Republican House and Senate lobbyist and served under former House Speaker John Boehner, R-Ohio.

John Sonsalla is a policy adviser in the firm's Washington office. He previously worked for former Rep. Joe Sestak, D-Pa., and the House Committee on Energy and Commerce.

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