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# Banking Legislation And Regulation To Watch In 2017

By **Evan Weinberger**

*Law360, New York (January 2, 2017, 1:03 PM EST)* -- The coming inauguration of President-elect Donald Trump and Republican majorities in both houses of Congress mean that banks and other financial firms can expect to see some changes they had been pushing for come to pass in 2017, but when those changes come and what they will be remains highly uncertain.

Many expect that Republicans will push forward with a rewrite of the 2010 Dodd-Frank Act, President Barack Obama's signature financial reform law. That could include anything from a restructuring of the Consumer Financial Protection Bureau to relief for small banks and changes to how banks are designated as systemically important. But a crowded agenda that includes tax reform, infrastructure spending and the confirmation of cabinet nominees and a U.S. Supreme Court justice mean that financial reform legislation could get pushed back.

In addition, potential philosophical differences between Republicans in the Senate and the U.S. House of Representatives, as well as the need to get a handful of Democrats to support legislation in order to avoid a filibuster, could slow down some significant reforms.

"It will take a great deal of political capital and political effort to enact these reforms and carry them out," said Donald C. Lampe, a partner at Morrison & Foerster LLP. "That's why we may not see a lot of immediate impact upon the inauguration of President-elect Trump."

The following are some of the changes that might be coming down the road.

**Rewriting Dodd-Frank**

Obama signed the Dodd-Frank Act in July 2010. Republicans took back the House of Representatives in that November's elections and almost immediately began their efforts to roll back the regulatory reform package the law delivered, with those efforts increasing after the GOP took the Senate in the 2014 elections.

Now, with Republicans maintaining their majorities and Trump set to take over for Obama, banks and other financial institutions are looking for those efforts to pay off.

But, for a variety of reasons, it's not going to be as easy as they hope, which means a wholesale rewrite of Dodd-Frank is less likely to be passed and signed into law than piecemeal legislation that could loosen regulations for regional and community banks, said Aaron Cutler, a Hogan Lovells partner and a former top House Republican staffer.

"Legislation — financial services and banking legislation — will be more targeted toward assisting small and regional banks and credit unions than larger banks," he said.

While Trump did not directly lay out his priorities on financial regulation, he did call Dodd-Frank a "disaster" during the presidential campaign. Trump's choice for treasury secretary, financier Steven Mnuchin, said after he was tapped in November that he wants to "strip back" Dodd-Frank because it is too complicated.

What that means is not entirely clear, but many believe that the Financial CHOICE Act, the financial regulatory rewrite introduced over the summer by Rep. Jeb Hensarling, the Texas Republican who leads the House Financial Services Committee, will serve as the guide for policymakers when they take on financial regulatory issues. Hensarling has said he hopes to reintroduce the bill with some changes early in the next congressional session.

"There's probably a consensus that the CHOICE Act is the starting point for financial regulatory reform because it's already passed muster in the House," said Joseph Lynyak, a partner at Dorsey & Whitney LLP.

The centerpiece of Hensarling's legislation is a provision that would allow banks to get out from under many of Dodd-Frank's capital and other prudential rules in exchange for complying with a simple 10 percent leverage ratio. Dodd-Frank required the banking regulators to put in place capital and other prudential enhancements required under the 2010 Basel III international banking accords.

The legislation as already passed would take a hatchet to the CFPB by putting a commission at its top rather than a single director and putting its funding into the hands of Congress.

The bill also removes Dodd-Frank's Title II, which gives the Federal Deposit Insurance Corp. the power to take a systemically significant financial institution into orderly resolution authority should it fail, and replaces it with a new chapter of the Bankruptcy Code. However, it does not entirely repeal Dodd-Frank, leaving in place derivatives clearing rules and other changes put in place by that law.

Also likely to be addressed is the threshold by which banks are deemed to be systemically important and subject to enhanced supervision by the Fed. Dodd-Frank mandated that all banks with $50 billion in assets or more carry that status, but policymakers from the Democratic and Republican sides have argued for making it higher.

The question is just how high that threshold will go, as well as how much Hensarling is willing to negotiate.

Some of Hensarling's priorities — including the structure and funding of the CFPB — are likely to get more support in the Senate than others, particularly gutting the ability to take apart failing financial giants, said Kevin Petrasic, a partner with White & Case LLP.

"You certainly could see significant philosophical disagreements, oddly enough between houses, in how to approach things," he said.

To date, Hensarling has been uncompromising about his legislative priorities. But with the power to get something signed into law, Hensarling may elect to compromise, particularly since many believe Trump will rely on him when it comes to financial regulation.

"It's an open question whether that approach will change now that he no longer has to contend with the threat of a presidential veto and his proposals therefore stand a much better chance of becoming law," Goldberg said.

**Going After the CFPB**

The CFPB has been a political lightning rod since it was first mentioned during the debate surrounding Dodd-Frank's drafting, with its leadership structure and function becoming a sort of proxy for the bureau's aggressive tactics.

Obama and his allies in Congress, including Sen. Elizabeth Warren, D-Mass., the CFPB's progenitor, stymied any changes to the CFPB's structure and prevailed in an extended battle over the confirmation of Richard Cordray to serve as its first director.

With Trump in office and Republican majorities in place, a new fight to restructure the CFPB may be in store — and with Democrats retaining the ability to filibuster any major changes to the bureau, a fight it will be.

Sen. Pat Toomey, R-Pa., has already spoken of attacking the CFPB's leadership structure through the budget reconciliation process, a maneuver that requires only 50 votes and was used by Democrats to pass the Affordable Care Act.

There are questions about whether the reconciliation process, which is intended for use on tax and budgetary issues, can be used to go after the leadership structure at the CFPB. But even discussing its use sends a strong message, said Gary Goldberg, a principal in Dentons' public policy and regulation group.

"There's a fair amount of momentum among Republicans, but these issues could bog down in the Senate unless Republicans are prepared to embrace Sen. Toomey's proposal to pursue financial regulatory reform through use of the reconciliation process as a means to bypass the customary 60-vote cloture threshold," Goldberg, a former Democratic House staffer, said.

Questions also hang over Cordray, whom Trump could try to fire before his term ends in 2018. A recent D.C. Circuit decision could give Trump the authority to do so, but that decision has been appealed.

Until Cordray leaves his post, most expect the CFPB to continue its aggressive enforcement and supervision of the thousands of firms it oversees, and to push forward with rulemakings, including one that would limit the use of mandatory arbitration clauses in a host of consumer financial contractions and one that would bring rules to the payday loan industry.

“As long as Director Cordray remains director, it’s business as usual at the bureau, but it’s business as usual with urgency,” Lampe said.

**The Future of the Financial Stability Oversight Council**

One of Dodd-Frank's key reforms was the creation of the Financial Stability Oversight Council, a panel that includes the country's top financial regulators and is meant to take a broad view of the U.S. financial system, as well as designating nonbank firms as systemically important financial institutions.

Firms designated as SIFIs are subject to increased supervision by the Federal Reserve and enhanced capital and other prudential standards.

To date, the FSOC has designated as SIFIs eight financial utilities, including derivatives clearinghouses, and four large nonbank firms. A pair of those — MetLife Inc. and GE Capital — have managed to escape the designation through litigation and divestment of assets, respectively.

Two others — American International Group Inc. and Prudential Financial Inc. — remain under Fed supervision.

The FSOC has been a target of Republicans, and Hensarling’s CHOICE Act would in its present state remove the council’s ability to designate firms as SIFIs while keeping it in place.

But legislation may not be needed in order to weaken the FSOC, Goldberg said.

"Effectively, even if you didn't get rid of the FSOC or strip it of many of its powers as Chairman Hensarling's Financial CHOICE Act envisions, they could basically convene periodically and be transformed into a stand-alone advisory committee that simply doesn't do very much," he said.

**Unleashing the Congressional Review Act**

One other way for Trump and his GOP allies in Congress to undo Obama’s financial regulatory agenda is to use the Congressional Review Act.

Put in place in 1996, the CRA gives Congress 60 "legislative days" from the date a new regulation is

finalized to invalidate it — a legislative day is a day both houses are in session. Because of congressional recesses and the like, any rule finalized by Obama's team since mid-June is up for review.

The CRA has successfully been used only once to date, but many believe that it will become a powerful tool in the next Congress.

What that means for banking is unclear, given the crowded legislative agenda and a host of rules from other agencies that may take priority, including the Labor Department's fiduciary rule that forces retirement advisers to put customers' interests ahead of their own.

One potential CFPB rule that could get hammered in the CRA process is the arbitration regulation after it's released, Lynyak said.

But even that might be difficult.

"Where do you end up with a consensus to build enough votes to get something like that passed? I think it's going to be hard to do," Lynyak said.

--Additional reporting by John Kennedy. Editing by Mark Lebetkin.