The Election's Impact on Securities Regulation

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The Department of Labor's new definition of ERISA fiduciary will not go into effect.

I am on record as having a dim view of the DOL fiduciary rule. I thought that the economic analysis behind it was simplistic and entirely results-oriented. DOL found one study saying that lack of fiduciary duties cost retirement investors one percent per year, found that there was $17 trillion in relevant assets and deemed that the new rule would save retirement investors $17 billion per year. There was no determination of means or averages or of disparate impacts based on account size. There was no analysis as to what the greatly enhanced liability would do to servicing costs – particularly to modest sized accounts. The SEC has been critical of firms charging wrap fees on low turnover accounts and there was no mention that it might be cheaper to pay commission for trades in low turnover accounts. I thought that the onerous requirements of the rule would make it near impossible for a small business to be engaged in servicing retirement accounts, thus increasing costs through market concentration. I thought that product availability in most retirement accounts under $1 million would be generally reduced to index funds due to lawsuit concerns. Moreover, I thought that the DOL was the wrong agency for this and that the SEC would consider these issues and the economic impacts much more judiciously.

I also had great concerns about DOL delegating enforcement of its rule for IRA accounts to the class action bar. DOL doesn't have enforcement authority over IRAs. A 1975 budget act apparently tied the Tax Code's definition of IRA fiduciary to DOL's definition of fiduciary. But, the only enforcement mechanism is an excise tax penalty by the IRS. So, DOL deputized the class action bar through the "Best Interests Contract Exemption" ("BICE"). In order to comply with fiduciary duties (even for a single transaction) there would need to be BICE contract that imposed onerous liability terms on the service provider and included a prohibition on contractual class action waivers. DOL was clear that it wanted the class action bar to do the enforcement it could not do. I am opposed to leaving regulatory enforcement to self-interested parties. It causes great economic distortions.

Finally, the DOL fiduciary rule also says that fiduciary duties attach for recommendations that someone roll over their 401(k) to an IRA. But, DOL ignored the fact that employers don't want former employees in their 401(k) plans, unless they own investment advisers. Former employees in the plan cost money, create ERISA fiduciary liability and provide no benefit to the employer. If the account balances are large (a common occurrence among older employees and recent retirees), then such concentrations could factor into the ADP and ACP non-discrimination tests and cause the employer to incur tax penalties (unless the employer chooses to use the 401(k) safe

harbor). From the employer's perspective, DOL should encourage 401(k) plan participants to roll over, not penalize those who help the plan participants do so.

Political opposition to the DOL Fiduciary Rule has been fierce. Congress passed a law to repeal it, but it was vetoed by President Obama. I think that this will be a high priority item for the new Congress and new administration. Something will be done to terminate the DOL Fiduciary Rule Amendment before the April 17, 2017 effective date.

Congress will revisit the Dodd-Frank Act

Congress is sure to revisit the Dodd-Frank Act. There will be reconsideration of market structure, the Financial Stability Oversight Council, to-big-to-fail regulations and proprietary trading by large banks.

From the securities disclosure perspective, there will be a reconsideration of using securities disclosure to pursue social or political aims. I think that Congress is likely to remove these Dodd-Frank disclosure requirements:

1) Conflict Minerals from the Democratic Republic of the Congo (Section 1502);
2) Mining Safety Disclosure (Section 1503);
3) CEO Pay Ration Disclosure (Section 953(b)); and
4) Resource Extraction Payments to Foreign Governments (Section 1504).

Moreover, continued efforts to politicize SEC-required disclosures through disclosures of political expenditures will go nowhere. You will recall that this issue was the sole cause of Senator Warren's recent intemperate letter asking President Obama to fire Chair White.

Less political items in Dodd-Frank that may be considered include:

1) ABS promoter credit risk retentions;
2) swap regulation;
3) whistleblower provisions;
4) credit rating agency regulation;
5) clawbacks;
6) enhanced compensation disclosure;
7) compensation committee independence;
8) auditor independence; and
9) broker voting.

Congress will generally not revisit the JOBS Act

The JOBS Act passed with bipartisan support. In general, I don't think Congress will tinker with it, with one exception. The current crowdfunding provisions in the JOBS ACT come from Senator Merkley's amendment in the Senate and was not in the House version. These provisions require periodic reporting of audited financial statements to the SEC if more than $500,000 is raised. This has greatly limited the number of issuers who may be inclined to use interstate crowdfunding to raise funds. Notably, the Texas

intrastate crowdfunding rule does not require periodic reporting of audited financial statements. Consequently, I think that the new Congress will revisit the crowdfunding periodic report requirements. It may also review the $1 million cap in a 12 month period.

The current House has passed out of Committee the Financial Choice Act of 2016 which contains the repeal of many Dodd-Frank Act provisions and the Merkley Amendment to the JOBS Act.