

[Excerpts]

OUTLOOK 2012: SEC REGULATORY AGENDA

This year, Dodd-Frank rulemaking will dominate, once again, the Securities and Exchange Commission's regulatory agenda, even as the agency tries to juggle other key priorities necessary to its mission. Meanwhile, the commission faces a bumpy road ahead from the convergence of a hotly contested election year, difficult rulemakings, and the new focus on cost-benefit analysis.

Harmonization.

The international aspects of the Volcker Rule, as well as derivatives, add an additional layer of complexity to the rulemakings, said Diana Preston, deputy general counsel of the American Bankers Association's Securities Association, and vice president of the ABA's Center for Securities, Trust and Investments. "So we have the challenge of interagency coordination in the United States, but we also have to consider harmonization issues amongst different countries," she said.

"The increased pressure in the regulatory environment today, as opposed to a decade or two ago, is to look at international harmonization and consider potential jurisdictional battles amongst countries," Preston continued. She noted that if the United States adopts rules that are considered extraterritorial, it could create a backlash in which other countries also adopt rules that have extraterritorial application. Caught in the middle are banks and other covered entities, which would be placed "in the impossible situation of trying to comply with completely different, and possibly contradictory, regimes," she said.

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Diana Preston, American Bankers Association

Crowley, for his part, suggested that regulators are moving carefully on the Volcker and swap rulemakings--and likely to proceed even more deliberately in future--because of the growing realization that tough regulations in the United States could cause capital to flee to other jurisdictions.

"It wouldn't surprise me at all to see a slowing in the implementation of the Volcker Rule," Crowley said. "It's clear that the anticipation of the rule and the attempts to get ahead of it are already constraining bank profitability."

Volcker's Effective Date.

Preston observed that a further challenge relating to the Volcker Rule is that it becomes effective in July regardless of whether any regulations have been adopted. Given that regulators are not close to finalizing their proposals, covered entities could be required to come into compliance with requirements that do not yet exist, she said.

“Again, I have a lot of sympathy for the regulators,” Preston said. “They have been given an enormous task here as a result of Dodd-Frank and have been asked to live with essentially inhuman rulemaking schedules.”

Preston added that the financial industry is hoping for some form of relief with respect to the July deadline. “The regulators have been so focused on getting their proposals out that they haven't really gotten their hands around how to address” that issue, she said. “We hope they are considering their options on this.”

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Daniel Crowley, K&L Gates LLP

As for derivatives, the SEC is required under Dodd-Frank's Title VII to coordinate its rulemaking with that of the CFTC. Together, the regulators have been charged with creating a framework to regulate over-the-counter derivatives. Very broadly, the SEC has jurisdiction over security-based swaps, while the CFTC has jurisdiction over other kinds of swaps.

The SEC has acknowledged that swaps would be one of its most challenging Dodd-Frank rule writing areas, given that the commission has not previously regulated the products (42 SRLR 1997, 10/25/10).

Most of the Title VII requirements were slated to be effective July 16, 2011. The Davis Polk report showed that of its 31 Title VII mandates, the SEC has missed the deadlines for 27, and only finalized three provisions. One provision does not have a deadline.

“The rulemaking the SEC and CFTC have to do in this area is so complex and enormous that by its very nature, the path forward will not be smooth,” Preston said.

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