

Congress Passes the FAIR Act, with New Tool to Nudge the SEC

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On September 27, 2017, Congress passed the [Fair Access to Investment Research Act of 2017](#) (the “FAIR Act”), sending the bill to President Trump for his signature. The FAIR Act instructs the SEC to amend its rules to ease various restrictions and burdens that broker-dealers face when issuing research reports on exchange-traded funds or certain other investment company securities. The FAIR Act requires the SEC, with respect to research on these investment funds, to (i) expand an existing safe harbor that prevents other research reports from being considered an “offer,” which could cause the research to be deemed a “prospectus,” and (ii) limit the extent to which such research reports would need to be filed with the SEC or FINRA.

Perhaps of even broader interest than the substance of the FAIR Act is a new device Congress employed in an attempt to hasten the SEC’s rulemaking. The bill includes a provision that one sponsor of the bill [described](#) as an effort to “hold[] the SEC accountable to follow Congress’ direction.” The bill directs the SEC to amend its rules, within 270 days of enactment, to implement the safe harbor in a manner consistent with specific parameters set forth in the bill. If the SEC fails to do so by the 270-day deadline, however, the bill provides for an “interim effectiveness” during which the expansions to the safe harbor would automatically be deemed to be in effect, “as if revised and implemented” in accordance with Congress’ directions.

Members of both sides of the aisle have expressed frustration with the SEC’s failure to meet statutorily mandated rulemaking deadlines. This has been particularly true for rulemakings required by the Dodd-Frank Act and the JOBS Act, each of which required a significant number of rules to be implemented under extremely tight timeframes. The interim effectiveness provision may spur the SEC to act more quickly to implement the FAIR Act in order to address the inevitable ambiguities contained in legislation—facilitating its implementation through their expertise in administering the securities laws. If this device is successful in forcing the SEC to accelerate its rulemaking efforts, look for Congress to employ it in future legislation.

At the same time, Congress’ effort to accelerate the pace at the SEC may be difficult for the agency to harmonize with opposing pressures suggesting that it needs to be more deliberative—and therefore slower. As we [have noted](#), recent D.C. Circuit decisions have invalidated SEC actions for failure to conduct sufficient analysis, including in terms of the cost-benefit analysis of new rules. We suspect the SEC has become more cautious and deliberative as a result of those cases. The House of Representatives also passed the [Financial CHOICE Act](#), which among many other things, would require the SEC to conduct laborious new analysis prior to engaging in any rulemaking, including an extensive cost-benefit analysis. While we do not expect the Financial CHOICE Act to pass in its current form, it is possible that Congress continues to consider imposing enhanced cost-benefit requirements on the SEC, which could run counter to Congress’ own efforts to speed up those SEC rulemakings that it favors.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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