ML STRATEGIES

Jason M. Rosenstock
Direct dial 202 434 7478
JMRosenstock@mlstrategies.com

Abby Matousek
Direct dial 202 434 7329
AMatousek@mlstrategies.com

ML Strategies, LLC
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004 USA
202 434 7300
202 434 7400 fax
www.mlstrategies.com

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FINANCIAL SERVICES LEGISLATIVE AND REGULATORY UPDATE

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Leading the Past Week

With the end of the week showing yet another solid showing in the jobs numbers, the Department of Labor reported that 227,000 jobs were added to our economy in February, it must have been serendipitous that we also saw an overwhelming majority in the House of Representatives come together to pass the so-called JOBS Act, a package of small business capital formation bills. Could this be the rekindling of bipartisanship in Congress? Perhaps, but only time, and maybe the transportation bill will tell, however it was fascinating that the largest partisan fireworks during the debate on the JOBS Act had do with which Congressman should get ownership over a section of the bill and not whether history will judge the JOBS Act in the same disastrous public policy vein as many progressives view Gram-Leach-Bliley. The other major news of the past week was that yet more Administration officials, including the Secretary of the Treasury, were quoted in public as calling for a delay in the implementation of the Volcker Rule. It is unclear whether these calls for delays will result in a re-proposal of the controversial rule, or whether they are part of strategy to push the official start date until after the elections, for a potentially different Congress or Executive branch to deal with it.

Legislative Branch

Senate

As House Moves on JOBS Act; Senate Ponders Capital Growth Bills:

As the legislation was advancing in the House (see more below) the Senate was also ramping up its consideration of legislation intended to increase small business capital growth. Late last month, Majority Leader Harry Reid (D-NV) promised to advance a similar package of legislative proposals and Senator Charles Schumer (D-NY) was quoted as saying he envisions a the Senate version going even farther than the House, including addressing "some needed precautions on investor protection." According to a spokesperson for Chairman Tim Johnson (D-SD), the Committee is still working on "putting together a comprehensive bipartisan" plan which would likely include provisions to: allow crowdfunding, legalize general solicitation, increase the Regulation A offering exemption, increase shareholder reporting thresholds, and ease the IPO process for firms. This legislation could be on the floor as soon as the Senate finishes its "vote-a-rama" on the Transportation bill, which could come as early as Tuesday of this week.

During the hearing last week, the Committee considered a number of these proposals, including Senators Schumer and Pat Toomey's (R-PA) S. 1933 which would create on IPO "on ramp" for emerging growth companies. The bill mirrors a similar House measure included in the JOBS Act to revitalize the IPO market for small companies. However, the general sense of the witnesses was that the bill would have little to no effect on the small IPO market. Additionally, witnesses discussed two other bills, Senator Scott Brown's (R-MA) S. 1791 and Senator Jeff Merkley's S. 1970, proposals to create a registration carve out for crowdfunding. The witness seemed supportive of the genesis behind the proposals but stressed that more must be done. "There's some good stuff in these bills, but I think that the lack of accountability is what's driving a lot of investors and consumers batty about these bills," said Lynn Turner, former chief accountant at the SEC, continuing: "So I think you've got to get the bad actor provisions and you've got to get the liability and the fiduciary standard in there, or it will take us back to the bucket shops and penny stock frauds."

Senate Special Aging Examines Retirement Options for Small Business Owners to Consider – Kohl to Introduce Legislation soon:
During a March 7th, hearing of the Senate Special Aging Committee, Chairman Herb Kohl (D-WI) announced he will be soon introducing legislation to encourage small businesses to create retirement plans for employees. Working in collaboration with Senator Michael Enzi (R-WY), the legislation would make it possible for small businesses to "pool together to create plans that use experienced financial experts to assume many of the administrative and fiduciary duties that small-business owners have neither the time nor the expertise to monitor."

Among those testifying at the hearing was Assistant Secretary for Employee Benefits Security, Phyllis Borzi, who told lawmakers that the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) attempts to help small businesses create retirement programs through outreach and education initiatives. Borzi also cited several regulatory initiatives such as a recent service provider fee disclosure rule which "improves the transparency of 401(k) fees and will help small businesses obtain investment, recordkeeping, and other services at a fair price." Also, testifying at the hearing was Charles Jeszeck, Director of Education, Workforce and Income Security at the GAO—who spoke to Senators on March 7th on a GAO report: Private Pensions: Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship. The report recommends that DOL lead an 'interagency task force' which would "coordinate existing research, education, and outreach efforts to foster small employer plan sponsorship."

Amendment to Crack Down on Foreign Tax Havens in Transportation Bill:
On March 8, the Senate approved by voice vote Senator Carl Levin's (D-MI) amendment which would give the Treasury new powers to penalize foreign financial institutions and governments

that are obstructing US tax enforcement. The amendment would allow the Treasury to bar those who are found to be impeding tax collection from participation in US financial markets. Speaking on his amendment, Levin told the Senate that "each year the United States loses literally tens of billions of dollars from people using offshore tax havens to dodge their tax obligations." It is unclear if this provision will survive the legislative process to become law. While Speaker John Boehner has said he will introduce the Senate's version of the transportation bill—or something similar—in the House, he has not given any indication whether Levin's provision would be included in the House version.

House of Representatives

House Overwhelmingly Passes JOBS Act; Challenges Senate to Act Quickly:

On March 8th, the House passed a package of bills, the Jumpstart Our Business Startups (JOBS) Act, aimed at easing restrictions on capital formation for small businesses. The measure passed the House in a 390 to 23 vote. As House Republicans urged the Senate to quickly vote on the House legislation, Majority Leader Reid said that the Senate would act on its on version of the package this week, vowing the Senate would move as quickly as they can on its legislation. Reid added that the Senate bill is "going to be different than the House bill."

Discussing the possibility of quickly reconciling the House version with the soon to be considered Senate version, Majority Leader Eric Cantor (R-VA), said: "All I can say is the President has endorsed this JOBS Act. And if we want to act with dispatch so that small businesses and startups can get going again, it seems to me the simplest way forward is to listen to the President on this one, listen to the majority—overwhelming majority in the House." Despite the Majority Leaders hopes, it is quickly becoming clear that there will be some major differences between the two bills, including a Senate provision to reauthorize the Export-Import (Ex-Im) Bank. While none of the differences have the potential to kill a final compromise, they signal a potentially rocky road for legislation designed to create jobs.

<u>Executive Branch</u>

White House

Administration Propose New Refinancing Plan:

On March 6th, the Obama Administration announced details of its new housing proposal with the aim of making it easier for borrowers to refinance using the Federal Housing Administration (FHA) loans with historically low interest rates. Currently, the FHA has up-front loan premiums of 1 percent of the loan balance and an additional 1.15 percent of the balance per year. However, under the proposed changes, the FHA would reduce the up-front premium to .01 percent for refinancing loans and cut the annual insurance fee to .55 percent for loans originated before June 1, 2009. Following the announcement, FHA officials clarified that the refinancings under this program would not count toward the "Compare Ratio" calculations which assess lender performance. As the refinanced loans are often at a higher risk of default, lenders have been reluctant to participate for the potential it will reflect poorly in their performance assessments.

However, the changes to the FHA's premium structure will come at a cost to the agency's already diminished capital reserves. While Donovan argued last week that reduced refinancing fees would help the FHA in the long-run, by allowing borrowers to avoid foreclosure, a November independent audit of the agency's Fund found that fund's capital reserve ratio was at .24 percent—far below the mandated level of 2 percent. Notably, as refinancing fees are set to be lowered, the cost of new FHA-insured loans will increase on April 1st, with annual fees increasing by 120 basis points and charges to borrowers rising from 1 percent of loan value to 1.75 percent. The lower refinancing fees are only part of a number of housing overhaul measures supported by the White House. President Obama also announced March 6th, that a review of foreclosures by military members since 2006 will be conducted.

SEC

Schapiro Defends Budget Before House Appropriators:

On March 6th, Chairman March Schapiro testified before the House Appropriations Subcommittee on Financial Services and General Government to defend the agency's $1.56 billion FY2013 Budget request. In defense of the $245 million increase for the Commission, Schapiro underscored that "the rapidly expanding size and complexity of the markets presents enormous oversight challenges." Schapiro promised Committee members that additional funding would go toward beefing up its staff with economists and specialists in a number of areas "to strengthen our oversight of the markets, protect against known risks, and best enable our markets to facilitate economic growth.

Despite the fact that the SEC's budget is traditionally deficit neutral and offset with user-fees, House Republicans have resisted providing additional funding for the agency to implement Dodd-Frank reforms. In response from Republican detractors on the panel, Schapiro underscored the SEC's success in the past three years, including: 735 enforcement actions in FY2011; an improved whistleblower program; improved financial controls; and work on the Dodd-Frank Act.

Deadline for Volcker Rule Continues to Slip Away As Regulators Ponder Re-Proposal:

Following last week's admission by Federal Reserve Chairman Ben Bernanke, Senior officials at the SEC hinted that the Commission may seek to overhaul its share of the joint rulemaking. Appearing before the House Appropriations Subcommittee, SEC Chairman Mary Schapiro said the Commission is "very carefully reviewing" the comments on the Volcker rule. She added that the SEC's goal "is to try to fulfill the obligations of the statute, but not to the detriment of our markets, and particularly not to the detriment of market making."

The same day, in a speech before the Institute of International Bankers conference, SEC Commissioner Daniel Gallagher urged US regulators to "go back to the drawing board" in order to make significant changes to the Volcker Rule. Gallagher's comments mirror those of fellow Republican Commissioner Troy Paredes who called for the proprietary banning rule to be re-proposed in February. Expanding on Paredes comments, Gallagher said the SEC should take a leadership role in revisiting the rule because of its expertise garnered from oversight of securities markets. Director of the SEC's Division of Trading and Markets, Robert Cook, also spoke before the conference, hinting that a re-proposal is possible. "Everything's on the table," said Cook.

It also seems that members of the SEC are not the only ones saying interesting things about the Volcker Rule, as Treasury Secretary Geithner, a speech before the Dallas Regional Chamber, stressed that banking regulators must take whatever time they need to get the rule right.

CFTC

As Gas Prices Continue to Rise Democratic Lawmakers Urge CFTC to Immediately Take Up Position Limit Rules to Curb Oil Speculation:
On March 5th, Democrats from both Chambers of Congress sent a letter to the CFTC, urging the Commissioners to take immediate action to curb excessive oil speculation by finalizing position limit rules. 23 Senators, nearly half of the Senate, along with 45 House members expressed their disappointment that over a year after Congress mandated position limits be in place the CFTC had not "fulfilled this important regulatory duty." The Commission voted on the position limit rules in October 2011; however, lacking sufficient data to calibrate the limits and awaiting a definition for swaps products, implementation has been delayed. Dismissing the CFTC's reasons for delay, the Commissioners that "Congress determined that speculative position limits are an effective and critically important tool to address excessive speculation in America's oil and gas markets." The letter requested that the CFTC "take immediate action to impose strong and meaningful position limits, and to utilize all authorities available to you to make sure that the price of oil and gasoline reflects the fundamentals of supply and demand."

FTC

FTC Commissioners Shed Light on MOU with CFPB:
On March 5th, in a hearing to consider the Federal Trade Commission's (FTC) FY 2013 budget request, significant attention was paid to the shared jurisdiction between the Commission and the CFPB. On January 23rd 2012, the FTC and CFPB signed a memorandum of understanding to coordinate efforts to protect consumers and avoid duplication of federal law enforcement and regulatory efforts. Chairman Jo Ann Emerson (R-MO) asked Chairman Jon Leibowitz to explain his interpretation of what part of FTC's jurisdiction is transferred and how agencies are working together. Chairman Leibowitz responded that the memorandum was written to ensure that the agencies would be efficient in targeting malefactors and that they have established six working groups with the CFPB that meet every week. Additionally, in response to how the FTC would confront tightened budgets due to sequestration, Commissioner Thomas Rosch told lawmakers that more responsibility would be transferred to the CFPB in order to confront the challenge. The discourse reflects the continued concern that the CFPB's efforts will duplicate those of established regulators.

<u>Miscellaneous</u>

Group Warns Dodd-Frank Rules face Invalidation Due to Poor Cost-Benefit Analyses:
On March 7th, the Committee on Capital Markets and Regulation (CCMR), a nonpartisan research organization, warned lawmakers that failing to conduct adequate cost-benefit analyses of Dodd-Frank rulemakings could lead to federal courts invalidating the rules. CMMR found

that of the 192 rules that had been proposed or finalized by November 16, 2011, 57 did not include cost-benefit analyses. Even potentially more troubling was that of the rules that contained the required analysis, 85 were deemed "entirely non-quantitative," while 50 were found to have failed to address the broader economic impact of the rule. CMMR stressed federal regulators must improve their measurement of economic benefits—pointing to *Business Roundtable v. SEC,* the July 2011 DC Circuit Court decision to invalidate the SEC's proxy access rules. Since the ruling, CCMR believes the SEC has improved its cost-benefit analyses; however reiterated "that significantly better-cost-benefit analysis is required to withstand judicial scrutiny."

Business Community Urges FSOC to Hold Hearing on SIFI Designations:
In a March 8th letter to the Financial Stability Oversight Council (FSOC), business groups asked for a public hearing on proposed rules for designation of nonbank systemically important financial institutions (SIFIs). "The consideration and resolution of the questions raised by the proposed rule and its appendix will be some of the most critical business before the FSOC this year," said the letter, continuing: "It is counter to the spirit of transparency embodied in the policy to expose to the public only the vote on the final proposal." Signatories of the letter included: The American Council of Life Insurers, American Insurance Association, Business Roundtable, Competitive Enterprise Institute, CRE Finance Council, Investment Company Institute, National Association of Manufacturers, National Association of Real Estate Investment Trusts, The Real Estate Roundtable and The U.S. Chamber of Commerce.

UPCOMING HEARINGS

The House is in Recess this Week but has Field Hearings Scheduled

On Wednesday, March 14th at 9:30am, in San Antonio, Texas, the House Financial Services Subcommittee on Financial Institutions and Consumer Credit will hold a field hearing titled "An Examination of the Challenges Facing Community Financial Institutions in Texas."

On Wednesday, March 14th at 2:30pm, in 538 Dirksen, the Senate Banking, Housing and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection will hold a hearing titled "Examining Issues in the Prepaid Card Market."

On Thursday, March 15th at 9:30am, in Las Vegas, Nevada, the House Financial Services Subcommittee on Financial Institutions and Consumer Credit will hold a field hearing titled "An Examination of Potential Private Sector Solutions to Mitigate Foreclosures in Nevada."

On Thursday, March 15th at 2:30pm, in 538 Dirksen, the Senate Banking, Housing and Urban Affairs Subcommittee on Housing, Transportation, and Community Development will hold a hearing titled "Strengthening the Housing Market and Minimizing Losses to Taxpayers."