

# Private Fund Update

January 22, 2014

**NOTE: Webinar on Volcker Rule:** Last week, Venable and ACG held a webinar, “The Volcker Rule and Its Impact on Private Equity,” which included an overview of the final rule, its compliance requirements, its impact on private equity funds, and exclusions to the rule, including SBICs and most BDCs. A copy of the slide deck for the presentation is [here](#). Also, Venable’s analysis of the Volcker Rule can be found [here](#).



**Scott E. Gluck, Esq.**  
Venable LLP

**Washington, DC Office:**

t 202.344.4426

c 540.454.4820

**Los Angeles Office:**

t 310.229.9900

c 540.454.4820

[sgluck@Venable.com](mailto:sgluck@Venable.com)

[www.Venable.com](http://www.Venable.com)

With Congress in recess and Winter Storm Janus blanketing the Eastern Seaboard in snow, this should be a slow week in DC. I am participating in a [Washington Update](#) panel Thursday morning at the [AM&AA Winter Conference](#) in Scottsdale, AZ, so if you are at the Conference, please stop by.

Last week the House unanimously passed H.R. 2274, which creates a simplified reporting regime for merger & acquisition brokers, while companion legislation was introduced in the Senate. If there is a JOBS Act 2.0, which is far from a given, this bill is all but certain to be included. This update reviews:

- House passage of H.R. 2274 and the introduction of S. 1923 in the Senate;
- Prequin’s 2014 Global Private Equity Report, which shows the fundraising strength of large funds in 2013;
- PrivCap’s briefing on top tax issues for private equity in 2014; and
- House Financial Services Committee hearing on unintended consequences of the Volcker Rule.

## The 113<sup>th</sup> Congress

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### House of Representatives

Last week the House of Representatives [unanimously passed H.R. 2274](#), the Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act, by a vote of 422-0. The bill creates a simplified reporting regime for merger and acquisition brokers (M&A brokers), and would allow M&A brokers who perform services in connection with the transfer of ownership of smaller privately held companies to register with the SEC by filing an electronic notice rather than having to register as a broker-dealer.

#### House Financial Services Committee

[Hearing on Volcker Rule](#) – On Wednesday the full HFSC held a hearing titled “[The Impact of the Volcker Rule on Job Creators, Part 1](#).” Witnesses were:

- [Kenneth E. Bentsen, Jr.](#), CEO, Securities Industry and Financial Markets Association
- [Charles Funk](#), President and Chief Executive Officer, MidWest One Bank
- [Professor Simon Johnson](#), MIT Sloan School of Management

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- [Elliot Ganz](#), General Counsel, The Loan Syndications and Trading Association
  - [David C. Robertson](#), Partner and Director, Treasury Strategies

The Committee Memorandum is [here](#), and a webcast of the video is [here](#).

A follow-up hearing on the Volcker Rule with legislators is scheduled for February 5.

### **House Small Business Committee**

[Hearing on Crowdfunding](#) – Last week the HSBC held a hearing on "[SEC's Crowdfunding Proposal: Will It Work for Small Businesses?](#)" to receive testimony from industry experts on how the SEC's crowdfunding rules will help meet the JOBS Act goal of getting capital to small businesses.

Witnesses were:

- [Jason Best](#), Principal, Crowdfund Capital Advisors
- [Daniel Gorfine](#), Director, Financial Markets Policy, Milken Institute
- [Mercer Bullard](#), Professor, University of Mississippi
- [David J. Paul](#), Co-Chair, Crowdfund Intermediary Regulatory Advocates

This hearing came after [the release of a study](#) by Crowdfund Capital Advisors showing how crowdfunding could help jumpstart job creation and growth among small businesses. The hearing notice is [here](#), and a video of the hearing is [here](#).

## **The Senate**

Senators Joe Manchin (D-WV) and David Vitter (R-LA) introduced [S. 1923](#), a Senate companion to H.R. 2274, which creates a simplified reporting regime for M&A brokers.

### **Senate Banking Committee**

The SBC has started the year off by focusing on the regulation of bank holding companies.

[Hearing on Regulating Financial Holding Companies and Physical Commodities](#) – SBC held a hearing on proposed regulations regarding the ability of financial holding companies to own physical commodities. Witnesses were:

- [Norman Bay](#), Director, Office of Enforcement, FERC
- [Vince McGonagle](#), Director, CFTC
- [Michael S. Gibson](#), Director, Board of Governors of the Federal Reserve System

A video of the hearing is [here](#).

[Hearing on Government Support for Bank Holding Companies](#) – Earlier in the month the committee held a hearing on a recent [GAO report](#) on the extent to which the federal government has provided support for bank holding companies in the wake of the financial crisis.

## **Securities and Exchange Commission**

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### **FY 2014 Budget**

The omnibus appropriations measure for FY 2014 which passed Congress and was signed by the President funds the SEC at \$1.35 billion. This is a \$29 million increase from last year's budget, but approximately \$324 million below the administration's budget request. SEC spokesman John Nester said

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that the funding level "will limit [the SEC's] ability to bolster our enforcement and examinations programs, implement our new duties regarding derivatives, private fund advisers and municipal advisors, and invest in critical technology for market oversight and law enforcement."

### Staying of New Rules Regarding Municipal Advisor

Last week the SEC [stayed its final rule on municipal advisers](#) until July 1, 2014, the date on which the first set of municipal advisers will be required to register under the final rules. The SEC recently issued [interpretive guidance](#) confirming that registered investment advisers are considered "municipal advisers" only when they provide investment advice relating to municipal derivatives that are or would be entered into by a municipal entity or obligated person in *connection with the issuance of municipal securities* as opposed to municipal securities in an investment portfolio. Thus, registered investment advisers that provide advice on municipal derivatives *in an investment portfolio for clients that are municipal entities* do not need to register as municipal advisers.

### 2014 Examination Priorities

The SEC announced its [Examination Priorities for 2014](#), which include several items relevant to investment advisers. The priorities include the safety of assets and custody under Rule 206(4)-2 (the SEC published a [Risk Alert](#) on the issue); undisclosed conflicts of interest, particularly with respect to compensation arrangements, allocation of investment opportunities, risk controls and disclosure and higher risk products or strategies targeted at retail or elderly investors; and inaccurate/misleading performance claims by investment advisers. Not surprisingly, issues involving general solicitations are also high on the SEC's list of priorities.

### Guidance Issued on "Bad Actor" Rule

The SEC's Division of Corporate Finance [issued guidance in the form of additional questions and answers](#) regarding certain key provisions of [the new "bad actor" rules](#) governing Rule 506 offerings. Perhaps most relevant for private funds is the clarification by the SEC in [Question 260.16](#) that an "affiliated issuer" does not mean every affiliate of the issuer that has issued securities – rather it is limited to only those affiliates *issuing securities in the same offering*. This makes clear that portfolio companies are not "affiliated issuers" of private equity funds for purposes of the rule.

Other relevant guidance comes in [Question 260.15](#), which states that if a placement agent becomes subject to a disqualifying event while an offering is still ongoing, the issuer can continue to rely on Rule 506 if the engagement with the placement agent is terminated and the placement agent does not receive compensation for future sales; and [Question 260.19](#), which makes clear that officers of a compensated solicitor are "participating" in a Rule 506 offering if they engage in a broad range of activities – well beyond just the solicitation of investors for the offering.

Click [here](#) to view Venable's analysis of the SEC's latest guidance on "Bad Actor" rules.

### SEC Investment Adviser and Investment Company Compliance Outreach Program January 30, 2014

The SEC announced that it has opened registration for its compliance outreach national seminar for investment advisers and investment companies. The event is intended to help these firms' Chief Compliance Officers (CCOs) and other senior personnel enhance their compliance programs for the protection of investors. The national seminar will be held on January 30 at the SEC's Washington, D.C., headquarters from 8:30 a.m. to 5:30 p.m. ET. The seminar agenda is [here](#).

## Commodity Futures Trading Commission (CFTC)

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### Meeting of Technology Advisory Committee

The meeting of the CFTC's Technology Advisory Committee that had been scheduled for Tuesday, January 21 was postponed because of the weather. Topics that were to have been covered during the meeting include the Commission's [concept release on automated trading environments](#).

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## Weekly Swaps Report

Here is a link to the CFTC's [Weekly Swaps Report](#) for the week ending January 3, 2013. The weekly report provides a detailed view of the swaps marketplace, covering the interest rate and credit asset classes that comprise about 90% of the approximately \$400 trillion swaps market. The report includes the gross notional outstanding value, the weekly transactions measured by dollar volume, and the weekly transactions measured by ticket volume.

## The Administration

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Congress passed and [the President signed](#) an omnibus agreement for FY 2014. The compromise bill provides \$1.12 trillion in discretionary spending for 2014, approximately halfway between the dueling budgets approved by the Senate (\$1.58 trillion) and the House (\$967 billion). Of particular note, the bill funds the SEC at \$1.35 billion (\$324 million below the amount requested) and the CFTC at \$215 million (\$100 million below the amount requested).

The President [nominated Maria Contreras-Sweet](#) to serve as Administrator of the Small Business Administration. Ms. Contreras-Sweet is the founder of ProAmerica Bank, the first Latino-owned business bank in California in over 30 years, and a former Secretary of the California Business, Transportation and Housing Agency.

## Association for Corporate Growth (ACG)

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### Middle Market Public Policy Summit

The Association for Corporate Growth (ACG) announced that it will be holding its [2014 Middle-Market Public Policy Summit on February 5, 2014](#) at the Grand Hyatt Washington Hotel in Washington, D.C. This event is open to all ACG members. To register for the Summit click [here](#).

### InterGrowth 2014

Registration has opened for [InterGrowth 2014](#), which will be held April 28 – May 1, 2014 at the Aria Hotel in Las Vegas. To register online for InterGrowth, click [here](#).

## Private Equity Growth Capital Council (PEGCC)

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### PEGCC Releases Performance Data

The PEGCC [released its performance update](#) through June 2013. Private equity returns significantly outperformed the S&P 500. Returns from private equity (net of fees) beat the S&P 500 (including dividends) for 5-year and 10-year horizons as of June 30, 2013 by 1.2 and 6.8 percentage points, respectively. Despite generating over 15% annualized returns, private equity funds underperformed the S&P 500 in 1-year and 3-year horizons because of the public market rally.

## Miscellaneous

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### Prequin 2014 Global Private Equity Report

Prequin released its [2014 Global Private Equity Report](#) (available for purchase) which shows that 2013 was a particularly good year for fundraising by large funds. Approximately \$169 billion was raised by 145 buyout funds last year, \$85 billion of which went to large funds with more than \$4.5 billion in AUM. The \$169 billion raised by buyout funds was the most since 2008, when buyout funds raised a total of \$230 billion. In 2012, a total of \$95 billion was raised.

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### PrivCap Briefing on Top Private Equity Tax Trends

[PrivCap](#) released a briefing on the [top private equity tax trends of 2014](#). The briefing covers transfer pricing, qualified stock purchases, the *Sun Capital* ruling, and comprehensive tax reform, among other issues. PrivCap also released a video titled "[How to Subtract Value Via Bad Tax Moves](#)."

### Crowdfund Capital Advisors Study on Crowdfunding

Crowdfund Capital Advisors [released a study](#) showing how crowdfunding could help jumpstart job creation and growth among small businesses. The study shows that 48% of companies said they intend to use crowdfunding proceeds to hire new staff, that crowdfunded companies increased quarterly revenues by an average of 24% post-crowdfunding, and equity-based crowdfunding companies increased revenue by 351%.

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