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Private Fund Update

November 4, 2013

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Last week the House of Representatives passed two relevant bills: one limits the Department of Labor's ability to impose a fiduciary duty on brokers and investment advisers, the other limits the "swaps push out" provisions of Dodd-Frank. The Senate Banking Committee held a hearing on JOBS Act implementation. Also of note, Houlihan Lokey released a report on shareholder activism and the Bipartisan Policy Center released a study on the Volcker Rule.

On Wednesday of this week, the CFTC is expected to unveil its revised position limits rule.

This Update reviews:

- The two financial services-related bills passed by the House of Representatives;
- Last week's Senate Banking Committee hearing on JOBS Act implementation;
- Comments received by the SEC in response to the Department of Treasury's study on the asset management industry;
- Charges the SEC brought against three registered investment advisory firms for violating the custody rule; and
- Reports by Houlihan Lokey on shareholder activism and the Bipartisan Policy Center on the Volcker Rule.

The President

The President spent much of the week [defending the administration](#) over glitches with the software for people [to sign up under the Affordable Care Act](#). The President [also delivered a speech](#) calling for more foreign investment in the United States.

The Office of Management and Budget [issued a veto threat](#) for H.R. 2374, the Retail Investor Protection Act, and [issued a Statement of Administration Policy](#) in opposition to H.R. 922, the Swaps Regulatory Improvement Act. Both measures passed the full House of Representatives by wide margins last week.

The 113th Congress

The Senate

Senate Banking Committee

[Hearing on JOBS Act](#) – The SBC held a hearing on the JOBS Act, entitled “[The JOBS Act at a Year and a Half: Assessing Progress and Unmet Opportunities](#).” Witnesses were:

Panel 1

- [Keith Higgins](#), Director, Division of Corporation Finance, SEC

Panel 2

- [Alan Lewis](#), Director of Special Projects, Natural Grocers
- [Robert Kaplan, Jr.](#), Managing Partner, Kaplan Voekler Cunningham & Frank PLC
- [Rick Fleming](#), Deputy General Counsel, NASAA
- [Mr. Sherwood Neiss](#), Principal, Crowdfund Capital Advisors, LLC

During the hearing, Ranking Member Johanns (R-NE) on several occasions commented on the possibility of a JOBS Act 2.0. Senator Johanns praised JOBS Act 1.0 and its bipartisan support in the last Congress. Similar to Chairman White in previous congressional hearings, Mr. Higgins with the SEC was reluctant to commit to dates for final rulemakings related to the JOBS Act but referenced that they had until midyear 2014 to complete these requirements. With Title II (relief from ban of general solicitation) and Title III (crowdfunding) concluding, the next hurdle is Title IV and Regulation A+, which creates a new exemption from the federal securities registration requirement for certain public offerings in an amount of up to \$50 million.

There was also a great deal of discussion around the definition of accredited investor and how the SEC and a recent [GAO report](#) have not found common criteria on how to capture the sophistication of these types of investors.

This week the SBC holds two hearings on housing finance reform; one on [protecting small lender access to the secondary mortgage market](#) and one on [affordable housing](#).

House of Representatives

The full House of Representatives passed [H.R. 992](#), the Swaps Regulatory Improvement Act, [by a vote of 292-122](#) and [H.R. 2374](#), the Retail Investor Protection Act, [by a vote of 254-166](#).

H.R. 992 would amend the provision of Dodd-Frank that requires federally insured bank holding companies to “push out” their derivatives activities to separate affiliates. The requirement was intended to prevent the federal government from providing a government backstop to risky derivative trading by such banks from receiving such funds from a government backstop.

H.R. 2374, among other things, requires the Labor Department to delay proposing a fiduciary rule for brokers who advise people on their retirement plans until the SEC has adopted a fiduciary rule for

brokers. The legislation is based on industry complaints that Labor and the SEC are not coordinating their activities. A more detailed summary of H.R. 2374 is [here](#).

House Financial Services Committee

[Hearing on JOBS Act 2.0](#) – The Capital Markets Subcommittee held a hearing entitled “[Legislation to Further Reduce Impediments to Capital Formation](#)” which discussed seven different bills and discussion drafts of bills:

- [H.R. 31](#) (Velazquez) – the Next Steps for Credit Availability Act;
- [H.R. 1800](#) (Grimm) – the Small Business Credit Availability Act;
- [H.R. 1973](#) (Mulvaney) – the Business Development Company Modernization Act;
- [H.R. 2274](#) (Huizenga) – Small Business Mergers, Acquisitions, Sales, and Brokerage Simplification Act;
- H.R. ____ (Hurt) – Would direct the SEC to relax its requirements that smaller public companies use eXtensible Business Reporting Language for periodic reporting (discussion draft);
- H.R. ____ (Duffy) – Would provide for an optional pilot program allowing certain emerging growth companies to increase the tick sizes of their stocks (discussion draft); and
- H.R. ____ (Fincher) – Would amend securities laws for emerging growth companies (EGCs) by, among other things, reducing the number of days an EGC must have a registration statement on file with the SEC before conducting a road show; requiring the SEC to revise its Form S-1 and allowing EGCs to submit a confidential draft registration statement to the SEC for any follow-on securities offerings after its IPO (discussion draft).

Witnesses were:

- [Heath Abshire](#), Arkansas Securities Commissioner, on behalf of NASAA
- [Michael Arougheti](#), CEO, Ares Capital Corporation
- [Michael Ertel](#), Managing Director, M&A Advisors, LLC
- [Alexander C. Frank](#), CFO, Fifthstreet
- [Gary K. Wunderlich, Jr.](#), CEO, Wunderlich Securities, on behalf of SIFMA
- [Tom Quaadman](#), VP, Center For Capital Markets Competitiveness, U.S. Chamber
- [David Weild](#), Chairman and CEO, IssuWorks

Three of the bills relate to potential changes to the regulation of Business Development Companies (BDCs), and most of the discussion was on this issue. Several of the proposed changes seem to have broad bipartisan support, but certain proposed changes, specifically changing the allowable leverage ratio and allowing BDCs to make investments in registered investment advisers, received pushback.

A video of the hearing is [here](#), and the Committee Memorandum, which does a good job of summarizing the various bills, is [here](#).

Last week the HFSC held two hearings:

[Hearing on Legislation to Reform the CFPB](#) – The Financial Institutions Subcommittee held a hearing entitled “[Examining Legislative Proposals to Reform the CFPB](#).” Witnesses were:

- Jess Sharp, Executive Director, U.S. Chamber Center for Capital Markets Competitiveness [[written testimony](#)]

- Robert S. Tissue, CFO, Summit Financial Group, on behalf of the WV Bankers Association [[written testimony](#)]
- Lynette Smith, CEO, Washington Gas Light FCU on behalf of the NAFCU [[written testimony](#)]
- Damon A. Silvers, Policy Director and Special Counsel, AFLCIO [[written testimony](#)]

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

The Committee also [held a hearing](#) on the Federal Housing Administration with FHA Commissioner and Assistant Secretary for Housing Carol Galante. Commissioner Galante's written testimony is [here](#), and a video of the hearing is [here](#).

Securities and Exchange Commission

Comments Received on Asset Management Industry

A number of organizations submitted comments to the Department of Treasury Office of Financial Research's [Study on the Asset Management Industry](#). Associations that submitted comments include the [Chamber of Commerce](#), [Blackrock](#), and [the Committee on Capital Markets Regulation](#). Several law firms also provided comments, including [Dechert](#), [Mayer Brown](#), and [Sidley Austin](#).

Three Investment Advisory Firms Charged with Violating Custody Rule

The SEC [charged three investment advisory firms](#) with violating the "custody rule" that requires them to meet certain standards when maintaining custody of their clients' funds or securities. The SEC issued orders instituting settled administrative proceedings against the three firms for deficiencies related to the custody rule – Rule 206(4)-2 under Section 206(4) of the Investment Advisers Act of 1940.

Annual Government-Business Forum on Small Business Capital Formation

The SEC will hold its annual [Government-Business Forum on Small Business Capital Formation](#) on November 21 in Washington, DC. The forum will include implementation of the JOBS Act and other issues. The forum is open to the public, and you can register for it [here](#).

Commodity Futures Trading Commission (CFTC)

Commission Passes Enhanced Customer Protections

The CFTC approved by a 3-1 vote final rules enhancing protections on customer funds held by futures commission merchants and derivatives clearing organizations. A fact sheet on the new final rules is [here](#) and questions and answers on the new rules are [here](#). The Commission also unanimously passed final rules on segregation for uncleared swaps and treatment of securities in a portfolio margining account. A fact sheet on this new rule is [here](#) and questions and answers are [here](#).

Drops Appeal of Federal Court Decision Overturning Position Limits Rule

The CFTC Commission also [voted to drop an appeal](#) of a federal district court decision overturning its position limits rule. The rule was struck down in *Int'l Swaps & Derivatives Ass'n v. CFTC*, 887 F. Supp. 2d 259, 280-82 (D.D.C. 2012). Commissioner O'Malia [issued a statement](#) saying that the Commission should never have pursued an appeal in the first place.

Commission to Vote on Position Limits

On Wednesday the CFTC [holds an open meeting](#) to consider position limits for derivatives.

Enforcement Division's Annual Results

The CFTC announced that it had obtained [a record \\$1.7 billion in monetary sanctions](#) during its 2013 fiscal year (ended September 30) and had filed a total of 82 enforcement actions. This year's civil monetary penalties total more than seven times the Commission's operating budget for the fiscal year. The [press release](#) has a good summary of all of the various enforcement actions taken by the CFTC this year.

Private Equity Growth Capital Council (PEGCC)

Report Ranking Top 10 Pension Funds by PE Returns and Allocations

The Private Equity Growth Capital Council [released a new study](#) revealing which public pension funds invested the most in private equity, as well as those that produced the highest rate of return on their private equity portfolios. The report examines 146 U.S. public pension funds with assets greater than \$1 billion, analyzes the asset allocation of these funds, and compares the performance of their private equity investments to other asset classes. According to the analysis, private equity returns to large public pension funds continue to outperform all other asset classes over 10-year time horizons.

The study contains a [detailed report](#), an [infographic](#) and an [interactive map](#). The PEGCC's analysis is broken down into four main categories: top 10 Pensions by PE Returns; top 10 Pensions by PE Allocation; Pension Asset Allocation and Pension Returns by Asset Class. An interview with PEGCC President and CEO Steve Judge on Bloomberg Television discussing the findings is [here](#).

Miscellaneous

Houlihan Lokey Report on Shareholder Activism

Investment bank Houlihan Lokey [released its first quarterly report on shareholder activism](#), which reviews the recent voting records of the three largest money managers in the U.S. and how these influential investors have cast their votes in recent proxy contests.

Bipartisan Policy Center Report on Volcker Rule

The Bipartisan Policy Center's Capital Markets Task Force [released a report on the Volcker Rule](#), which recommends an alternative solution to the proposed ban on proprietary trading and the Lincoln Amendment, which "pushes out" swaps by federally-insured bank holding companies. The task force also recommends delaying implementation of the Lincoln Amendment until more real-world experience is gained with the Volcker Rule.

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