

**Quick note:** I want to thank private markets network [Axial](#) for including my Private Fund Update in its list of “[16 Websites Deal Professionals Should Visit Daily.](#)” Although I currently only send out a weekly email, I expect to move more online in the next few weeks and hopefully add new features as well. In any event, thanks for the kind words!

## Private Fund Update

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Congress heads back into session to tackle an increasingly crowded legislative calendar with Syria now sitting atop a pile of unresolved issues. Others include avoiding a government shutdown by September 30<sup>th</sup>, 2014 appropriations, the Farm Bill and WRDA reauthorization. These items are likely to push non-essential legislation – like tax reform and immigration – further into the background over the next few months.

This Update contains:

- A summary of legislation relevant to private funds that has been introduced in the various Committees;
- A review of actions taken by the SEC during the August recess;
- Links to relevant Congressional hearings taking place this week; and
- Reports recently issued by Third Way, Privcap, Davis Polk and the PEGCC.

### The President

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The President spent August talking about a variety of domestic issues, including [civil rights](#), [college affordability](#), [affordable care act implementation](#), and [interest on student loans](#). In recent weeks, [Syria](#) has dominated the discussion and foreign policy issues will continue to suck up the oxygen in DC this week.

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

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Both the Senate and the House return to a busy legislative calendar. The Senate will take up authorizing the use of military force in Syria early in the week, followed by the House if it passes the Senate.

Here is a recap of what has taken place thus far relevant to private funds and links to upcoming hearings:

#### The Senate

##### Senate Appropriations Committee

[SEC and CFTC Funding](#) – The SAC [passed its FY 2014 financial services bill](#) on July 25 by a vote of 16-14. The bill funds the SEC at \$1.674 billion (\$353 million above FY 2013) and the CFTC at \$315 million (\$110 million above FY 2013).

## **Senate Agriculture Committee**

**CFTC Reauthorization** – On July 17, the committee held a [lengthy two-panel hearing](#) on CFTC reauthorization. Because the CFTC regulates most swaps and derivatives, this legislation could be a vehicle for technical amendments to Title VII of Dodd-Frank – which regulates swaps. The Committee has also released a [list of comment letters](#) received in connection with the reauthorization. The most important legislation in this regard is [S. 888](#), which would provide clarity that end-users of swaps are exempt from margin requirements. There currently is a split between the proposed rules issued by the [CFTC](#) (margin not required) and the [Prudential Regulators](#) (margin is required). Although [S. 888](#) has attracted an impressive list of [sixteen co-sponsors](#), the bill has thus far not been able to advance.

## **Senate Banking Committee**

The SBC has focused mostly on the federal housing finance system (FHA, Fannie Mae and Freddie Mac reform) thus far. Other topics they have worked on include [regulation of financial holding companies](#) and [mitigating systemic risk](#). The [written testimony](#) of SEC Chairman Mary Jo White during the July 30 hearing on mitigating systemic risk provides a concise, comprehensive overview of major regulatory issues the SEC is working on.

The committee passed S. 1376, [the FHA Solvency Act of 2013](#), but has yet to take up legislation that would impact private funds in any material way and is likely to continue to focus on federal housing finance reform at least through the end of the year.

This week the Committee holds hearings on [Assessing the Investment Climate and Improving Market Access in Financial Services in India](#) and [Essential Elements of Housing Finance Reform](#).

## **Senate Finance Committee**

The SFC and HWMC have diligently worked together to consider comprehensive tax reform, but this looks increasingly unlikely this Congress. The Committee issued Tax Reform Option Papers on [Business Investment and Innovation](#) and [Income and Business Entities](#).

## **Senate Small Business Committee**

The SSBC passed S. 511, the [Expanding Access to Capital for Entrepreneurial Leaders \(EXCEL\) Act](#) by voice vote on June 17. The bill increases the maximum amount of leverage a family of funds can receive from the SBIC from \$225 million to \$350 million and also requires the SBA to publicize certain information regarding each SBIC that receives leverage from the SBA.

## **House of Representatives**

### **House Agriculture Committee**

**CFTC Reauthorization** – The committee held two hearings before the recess on reauthorization of the CFTC: [The Future of the CFTC: Commission Perspectives](#) and [The Future of the CFTC: End-User Perspectives](#). Commissioners Scott O'Malia ([testimony](#)) and Mark Wetjen ([testimony](#)) testified at the first hearing and a bevy of end-users testified at the second hearing. A video of the hearing with the two Commissioners is [here](#) and a video of the end-user hearing is [here](#).

## **House Financial Services Committee**

The Committee has been extremely active thus far, although much of it has been focused on federal housing finance reform (GSE reform). Before recess, the Committee passed H.R. 2767, the [Protecting American Taxpayers and Homeowners \(PATH\) Act](#) which, among other things, winds down Fannie Mae and Freddie Mac by [a 30-27 vote](#). The bill will not pass the Senate as-is, but discussions between House and Senate (which has also been active on GSE reform) are ongoing.

The Committee has already considered a number of bills potentially relevant to private funds thus far:

- [H.R. 1105](#), the [Small Business Capital Access and Job Preservation Act](#) – exempts from SEC registration private equity fund advisers that have not borrowed and do not have outstanding principal amount in excess of twice their funded capital commitments. The bill passed Committee by a bipartisan [vote of 38-18](#), with eight Democrats supporting the measure and is awaiting a floor vote.
- [H.R. 2374](#), the [Retail Investor Protection Act](#) – prevents the Secretary of Labor from prescribing regulations under ERISA defining a fiduciary until 60 days after the SEC issues a final rule relating to standards of conduct for brokers and dealers pursuant section 913 of the Dodd-Frank Act. It also requests the SEC to study whether retail customers are being harmed because broker-dealers have a different fiduciary standard than investment advisers and determine that the benefits of such a rule outweigh the costs. The bill was approved by a 44-13 vote after an [amendment](#) offered by Congressman Murphy (D-FL) was agreed to by voice vote.
- [H.R. 1564](#), the [Audit Integrity and Job Protection Act](#) – prohibits the PCOAB from requiring that: (i) the audits of a particular issuer be conducted by a specific auditor; or (ii) an issuer's audits be conducted by different auditors on a rotating basis. This was approved by a [52-0 vote](#) after an [amendment](#) by Ranking Member Waters (D-CA) was accepted by unanimous consent.

Other relevant bills that have been introduced by not yet voted on include:

- [H.R. 2274](#), the [Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act](#), exempts from FINRA registration M&A activities under \$25 million EBITDA between a private company and a control buyer. The registration exemption does not permit capital raising.
- [H.R. 1952](#), the [Spreading Pricing Liquidity Act](#) (Tick Size Bill), amends the Securities Exchange Act to authorize the board of directors of an issuer with a public float of \$500 million or less to select to have the issuer's securities quoted and traded using an increment (tick) of either \$0.05 or \$0.10.

Chairman Hensarling has [announced his September hearing schedule](#), which includes three hearings this week on [Reducing Waste and Fraud in Housing Programs](#), the [History of the Federal Reserve](#) and the [Semi-Annual Report of the CFPB](#).

## **House Ways and Means Committee**

The HWMC held several hearings as part of the push by Chairman Camp and SFC Chairman Baucus for comprehensive tax reform, including hearings on reforming the taxation of [pass-through entities](#) and [financial products](#). Here are links to an [Overview](#), [Summary Description](#), [Draft Legislation](#) and [Technical Explanation](#) of the proposed reforms for the taxation of financial products and links to an

[Overview](#), [Summary Description](#), [Draft Legislation](#) and [Technical Explanation](#) of proposed reforms for small businesses and pass-through entities.

### **House Small Business Committee**

The HSBC held a hearing before recess [examining the popular SBIC Program](#). The Hearing Memo is [here](#), and a video is [here](#). Congressman Chabot has introduced H.R. 1106, the [Small Business Investment Company Modernization Act of 2013](#), which is similar to but more limited than S. 551, but the Committee has not yet taken up the legislation. The Committee is expected to consider a major review and potential overhaul of the Small Business Administration this Congress.

## **Securities and Exchange Commission**

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### **Comments on Proposed Rule re: General Solicitation Due September 23**

Comments on the SEC's [proposed rule](#) imposing new restrictions on general solicitations by issuers, including private funds are due on September 23. Thus far, [over 300 comments](#) have been submitted, most of which relate to the impact on startups and venture capital. The SEC's [final rule](#) eliminating the prohibition against general solicitations and the [final "bad actor" rule](#) also go into effect on that date.

### **Former Oppenheimer PE Fund Manager Charged re: Misleading Fund Performance**

The SEC [charged a former portfolio manager at Oppenheimer & Co](#) with misleading investors about the performance of a PE fund-of-funds he managed. Among other things, the portfolio manager distributed marketing materials reporting an IRR that failed to deduct fees and expenses, causing the IRR to be higher than it actually was.

### **Meeting of Advisory Committee on Small and Emerging Companies**

The SEC's Advisory Committee on Small and Emerging Companies [will have a meeting](#) on September 17. An agenda has not yet been posted.

### **Investor Adviser Alert on Continuity Planning**

The SEC's Office of Compliance Inspections and Examinations (OCIE) [issued a Risk Alert](#) on business continuity and disaster recovery planning for investment advisers. The alert, prompted by a review of responses to Hurricane Sandy, contains staff observations and lessons learned from the disaster and urges investment advisers to review and update their business continuity and disaster recovery plans.

### **Compliance Outreach Seminars**

The SEC [is holding a series of seminars](#) around the country as part of its Compliance Outreach Program for investment adviser and investment company senior officers, including chief compliance officers (CCOs). The seminars highlight areas of focus for compliance professionals and allow SEC staff to identify common issues found in examinations or investigations and discuss industry practices, including how compliance professionals have addressed such matters. The upcoming seminars are:

- New York – September 13:
- Atlanta – September 25:
- San Francisco – November 6:

For more information and to register for the seminars, click [here](#).

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### Promotions at SEC – IA/IC Examination Program and Division of Investment Management

The SEC [named Jane Jarcho](#) as National Associate Director of the Investment Adviser/Investment Company examination program in the Office of Compliance Inspections and Examinations (OCIE). In this role, she will oversee a staff of approximately 450 lawyers, accountants and examiners responsible for inspections of U.S.-registered investment advisers and investment companies. The SEC [also named Eun Ah Choi](#) as Managing Executive of the Division of Investment Management.

## Commodity Futures Trading Commission

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### Mandatory Clearing Requirement Goes Into Effect Today

It was a slow month at the CFTC. A reminder that the [mandatory clearing requirement](#) takes effect for Category 3 entities (end-users and captive finance entities) today, September 9. To take advantage of the end-user exception, end-users can adhere to the ISDA [August 2012](#) and [March 2013](#) protocols.

## Association for Corporate Growth (ACG)

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### Los Angeles Business Conference September 17-18

The [Los Angeles Business Conference](#) is scheduled to take place on September 17-18 in Beverly Hills. Former President Bill Clinton is the keynote speaker.

### Middle Market Growth Daily

To check out ACG's Middle Market Growth Daily, a daily roundup of news and other items of interest to the middle-market private equity community, check out [www.mmgdaily.com](http://www.mmgdaily.com).

## Private Equity Growth Capital Council (PEGCC)

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### Private Equity Trends Report

The PEGCC released its first [Private Equity Trends Report](#) last month. The report finds that private equity activity increased in the second quarter of 2013 after a sluggish first quarter. PE fundraising and exit volumes surged and investment volume also increased, but at a moderate pace. After record private equity exit volumes in 2012, exits appear to have returned to trend based on a four-quarter rolling average.

## PrivCap

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### Release of Videos on Private Equity

PrivCap released several interesting videos on private equity, including one entitled "[What is Private Equity? A Brief Overview](#)" and another on [100 Day Plans for Private Equity Funds](#) .

## Third Way

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### Report on Dark Pools

The think tank [Third Way](#) released a report on Dark Pools, entitled [Dark Pools: Fear of the Dark](#), which provides a nice, concise summary of what these computerized stock trading platforms actually are, why dark stock trading is not a new phenomenon, what makes dark pools different from stock exchanges, and why pension and mutual fund managers value trading in the dark.

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## Miscellaneous

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### [GAO Report on Criteria for Qualifying as an Accredited Investor](#)

The GAO issued a [report](#) stating that the SEC should consider alternative criteria for individuals to qualify as an accredited investor. GAO analysis of federal data on household net worth showed that adjusting the \$1 million minimum threshold to approximately \$2.3 million, to account for inflation, would decrease the number of households qualifying as accredited from approximately 8.5 million to 3.7 million. Private funds interviewed for the study said they would be resistant to increased thresholds for AI status, as that would decrease the number of eligible investors.

### [MFA Hedge Fund Fundamentals](#)

In advance of the lifting of the ban on general solicitations on September 23, the Managed Fund Association's [Hedge Fund Fundamentals](#) released an online tutorial entitled [Hedge Fund Due Diligence: Resources to Help Investors Better Understand Their Investment Options in this Asset Class](#). The video provides basic information about who can invest in hedge funds as well as some potential red flags regarding investment fraud.

### [Davis Polk Dodd-Frank Progress Report](#)

The law firm Davis Polk issued its [September 2013 Dodd-Frank Progress Report](#), which shows that as of September 3, 2013, a total of 280 Dodd-Frank rulemaking requirement deadlines have Passed (70.4% of the 398 total rulemaking requirements). Of these 280 passed deadlines, 172 (61.4%) have been missed and 108 (38.6%) have been met with finalized rules. Regulators have not yet released proposals for 64 of the 172 missed rules. Of the 398 total rulemaking requirements, 160 (40.2%) have finalized rules, 112 (28.1%) have proposed rules and 126 (31.7%) do not yet have proposed rules.

### [Pitchbook Q3 2013 Private Equity Breakdown](#)

Pitchbook released its Q3 Private Equity Breakdown. The report finds PE deal-making was at a lackluster pace in 2Q 2013, reaching a new quarterly low since the depths of the financial crisis. PE firms invested \$71 billion across 318 deals in the second quarter, down from 420 investments in 1Q 2013 and far off last year's stellar fourth quarter, in which 671 companies received \$141 billion in PE money. One deal – Berkshire Hathaway and 3G Capital's \$23.2 billion buyout of condiment maker H.J. Heinz – made up nearly one-third of all capital invested in the second quarter. A copy of the report can be obtained [here](#).

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