

Private Fund Update

December 16, 2013

NOTE: Webinar December 17: Tomorrow (December 17), I will be participating in a Thomson Reuters webinar entitled "[SEC Enforcement Activity and Regulatory Update for Private Equity Funds](#)," which will include an overview of the SBIC licensing program, best practices for SEC examinations and an update on recent SEC enforcement actions against private funds. Please feel free to register!



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Congress wraps up its work for the year this week as the Senate takes up the two-year budget agreement that passed the House on a strong 332-94 vote.

This update reviews:

- Recent SEC guidance on the "bad actors" rule which makes clear that portfolio companies are not considered "affiliated issuers" in Rule 506 offerings;
- Approval of the Volcker Rule by five federal agencies;
- The Association for Corporate Growth's 2014 Policy Summit, taking place on February 5, 2014; and
- The SEC's 2014 Compliance Outreach seminar, taking place on January 30, 2014.

This will be my last Private Fund Update for the year. **If there are ways that I can make these updates more relevant for you, please let me know** by emailing me at sgluck@Venable.com or calling me at 202.344.4426.

Finally, please be aware that Venable provides [a broad range of services](#) for private equity funds, [including, but not limited to, legislative and regulatory work](#).

The 113th Congress

House of Representatives

The House passed the two-year budget agreement negotiated by Senator Murray (D-WA) and Congressman Paul Ryan (R-WI). The agreement pegs FY 2014 federal discretionary spending at \$1.012 trillion – above the \$967 billion otherwise required under the Budget Control Act – and FY 2015 spending at \$1.014 trillion. The bill passed the House [on a bipartisan 332-94 vote](#). The House also passed the Defense Authorization Act [by a 350-69 vote](#).

The week before last, the House passed H.R. 1105, which exempts private equity funds from having to register under the Investment Advisers Act, [by a vote of 254-159](#). [Thirty-six Democrats supported the measure](#), including several members from the New York delegation (Israel, Maffei, Sean Maloney, Meeks, Owens). One Republican (Jones from North Carolina) opposed. Congresswoman Carolyn Maloney (D-NY) [offered an amendment](#) that would have required the SEC to create a simplified registration and disclosure procedure for funds between \$150 million and \$1 billion in assets under management. The House [defeated the amendment, largely along partisan lines](#).

House Financial Services Committee

Last week, HFSC Chairman Hensarling indicated that he plans to have the Committee conduct an [aggressive series of hearings during 2014 focused on intensive oversight of the Federal Reserve](#). The Chairman hopes that this culminates in the development of legislation to reform how our nation's central bank operates.

The Committee wrapped up the year with two hearings:

[Hearing on Federal Reserve Mandates](#) – The HFSC held a hearing entitled “[Rethinking the Federal Reserve’s Many Mandates on its 100-Year Anniversary](#).” Witnesses were:

- [Douglas Holtz-Eakin](#), President, American Action Forum
- [Alice Rivlin](#), Senior Fellow, Economic Studies, Brookings Institution
- [Marvin Goodfriend](#), Friends of Allan Meltzer Professor of Economics, Tepper School of Business, Carnegie-Mellon University
- [Hester Peirce](#), Senior Research Fellow, Mercatus Center, George Mason University

The Committee Memorandum is [here](#).

[Treasury Secretary Lew Testimony](#) – Last week, Secretary of the Treasury Lew provided his annual testimony to the House Financial Services Committee on the state of the international finance system. The committee memorandum is [here](#), Secretary Lew's written testimony is [here](#), and a video of the hearing is [here](#).

House Small Business Committee

The HSBC wrapped up the year with two hearings, one on federal agency acquisitions and another on how the Affordable Care Act impacts small businesses.

[Hearing on Federal Agency Acquisitions](#) – HSBC held a three-panel hearing entitled “[Contracting Away Accountability – Reverse Auctions in Federal Agency Acquisitions](#),” focused on the uses of reverse auction contracts, including the budgetary effect of reverse auctions services, their effect on competition, and whether additional guidance or legislation is necessary.

[Hearing on Small Business Health Options](#) – HSBC held a hearing entitled “[The Small Business Health Options Program: Is It Working for Small Business?](#)” The hearing examined the status of the establishment of both federally-run and state-based SHOP exchanges. The sole witness was Gary Cohen, Deputy Administrator and Director of the Centers for Medicare and Medicaid Services in HHS. Mr. Cohen's written testimony is [here](#) and the hearing memo is [here](#).

The Senate

Senate Banking Committee

The SBC held three hearings last week on [housing finance reform](#), [rebuilding American manufacturing](#), and [assessing the interim nuclear agreement with Iran](#).

Senate Finance Committee

Late last month, SFC Chairman Max Baucus released discussion drafts of proposals to reform [international business tax](#), [tax administration/combating tax fraud](#), and [reforming cost recovery and tax accounting rules](#). The cost recovery proposal would change the rules for depreciation of tangible and intangible assets, repeal LIFO accounting, and allow companies with gross receipts under \$10

million to use cash accounting and expense inventory costs. Here are links to a [one-pager](#), [summary](#), and [technical explanation](#) of the proposed changes.

Securities and Exchange Commission

Volcker Rule Finalized

On Tuesday, five federal agencies (the [Federal Reserve](#), OCC, [FDIC](#), [CFTC](#), and SEC) voted to [approve the final Volcker Rule](#). The SEC approved the rule by a 3-2 vote, with dissents by Commissioners [Michael Piwowar](#) and [Daniel Gallagher](#). The rule generally prohibits banks from investing more than 3% of their Tier One capital into covered funds (including private equity and hedge funds) and also from owning more than 3% of any individual covered fund. Importantly, the rule *excludes investments in SBICs* from this calculation. The rule becomes effective April 1, 2014, but the Federal Reserve Board extended the conformance period to July 21, 2015.

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](#), 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.

Guidance Issued on Venture Capital Registration Exemption

The SEC’s Division of Investment Management [issued guidance on the registration exemption for advisers to venture capital funds](#). The guidance covers:

- The use of intermediate holding companies “wholly owned” by a venture capital fund;
- The use of alternative investment vehicles (AIVs) by venture capital funds;
- The use of “warehoused investments;”
- The use of side funds; and
- The use of liquidating trusts.

SEC Investment Adviser and Investment Company Compliance Outreach Program – Jan. 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 to 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](#) and a link to register for the program is [here](#).

Dodd-Frank Investor Advisory Committee Recommends User Fees on Registered IAs

The SEC’s [Dodd-Frank Investor Advisory Committee](#) approved a [proposal to impose user fees on SEC registered investment advisers](#) to fund an enhanced investment adviser examination program by the SEC. The proposal recommends that Congress pass [H.R. 1627](#), the Investment Adviser Examination Improvement Act of 2013, authored by Congresswoman Maxine Waters (D-CA). This proposal [was supported](#) by the Investment Adviser Association and other groups. The Committee also approved a

second proposal that would encourage the SEC to [conduct a rulemaking to impose a fiduciary duty on broker-dealers](#) when they provide personalized investment advice to retail investors. A link to the full video of the meeting is [here](#).

Commodity Futures Trading Commission (CFTC)

CFTC Approves Volcker Rule

As with the other federal agencies, last week the CFTC approved the Volcker Rule. Chairman Gensler's statement in support of the rule is [here](#).

Weekly Swaps Report

Here is a link to the CFTC's [Weekly Swaps Report](#) for the week ending November 29, 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

The Office of Management and Budget [issued a brief Statement of Administration Policy](#) supporting the two-year budget deal which passed the House of Representatives last week. Also, the President [issued a brief statement](#) upon passage of the Volcker Rule.

Association for Corporate Growth (ACG)

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 the public, and an agenda and link to register will be finalized shortly.

Miscellaneous

Chamber's FSOC Reform Agenda

The Chamber's Center for Capital Markets Competitiveness [released a report highlighting the need for reform of the Financial Stability Oversight Council \(FSOC\)](#). The report lists 14 specific proposals to strengthen evidence-based analysis by FSOC, modify FSOC's structure, and improve operational effectiveness. FSOC has come under fire by critics for lack of transparency in how it designates entities as systemically important.

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