

Private Fund Update

June 2, 2014



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
www.Venable.com

The Senate returns to action this week while the House is out of session this week. This update includes:

- Last week's launch of the Congressional Caucus for Middle Market Growth, sponsored by the Association for Corporate Growth (ACG), GE Capital and the National Center for the Middle Market;
- The results of last month's House Financial Services Committee markup on multiple JOBS Act 2.0 bills;
- The recent Financial Stability Oversight Counsel (FSOC) conference on the asset management industry;
- The Department of Labor's decision to delay its final rule imposing fiduciary standards on advisers who provide retirement advice; and
- A report by the Private Equity Growth Capital Council (PEGCC) finding that PE activity reached a five-year Q1 high last quarter, although overall fundraising and deal activity declined from the prior quarter.

Note: The head of the SEC's Office of Compliance Inspections and Examinations recently [gave a speech](#) (described below) warning private equity managers about several areas where PE funds are failing to meet their obligations under the Investment Advisers Act. A key problem area is the issue of fees and expenses charged by the general partner.

Venable attorneys, including myself, can help fund advisers comply with the IAA and avoid the issues described in the speech. If you would like to discuss having Venable perform a risk assessment for your firm, or if you have any other questions, please contact me directly at sgluck@venable.com.

Have a great week, and again please email me (sgluck@venable.com) any questions you have in advance of the SEC webinar on Wednesday.

Venable LLP [tracks a wide range of regulatory issues](#), so please contact me for more information regarding anything contained in this update.

The 113th Congress

House of Representatives

House Financial Services Committee

[Markup on JOBS Act 2.0 Legislation Postponed](#) – The HFSC had been scheduled to markup a number of bills, several of which are relevant to private funds. Unfortunately, the markup was postponed due to the death of the mother of Congresswoman Maxine Waters, the Committee's Ranking Member. Bills which were to be marked up include:

- [H.R. 4697, "Small-Cap Access to Capital Act"](#) – Revises the definition of a "well-known seasoned issuer" by reducing the dollar amount in worldwide market value of outstanding voting and non-voting common equity held by non-affiliates from \$700 million to \$250 million.
- [H.R. 2629, "Fostering Innovation Act of 2013"](#) – Requires the SEC to revise the definition of an "accelerated filer" to include issuers that have annual revenues of greater than \$100,000,000 during the most recently completed fiscal year for which audited financial statements are available and have an aggregated worldwide market value of the

voting and non-voting common equity held by its non-affiliates of \$250,000,000 or more, but less than \$700,000,000.

- [H.R. 4564, "Equity Crowdfunding Improvement Act of 2014"](#) – amends Title II of the JOBS Act regarding equity crowdfunding in several respects. Among other things, it makes clear that equity investments which are crowdfunded must be through an intermediary.

[Markup on JOBS Act 2.0 Legislation](#) – Last month, the HFSC held a lengthy markup of over a dozen different bills, several of which are relevant to private funds and SBICs. Here is a summary of what took place with the bills most relevant to private funds:

- [H.R. 4200, "SBIC Advisers Relief Act of 2014"](#) – Reduces regulatory costs and eliminates duplicative regulations for advisers to SBICs. The bill (i) preempts state regulation of SBICs, (ii) allows advisers of VC funds to continue to be exempt reporting advisers if they also advise an SBIC, and (iii) excludes SBIC capital from the SEC registration threshold calculation of \$150 million in assets under management. [Passed by a vote of 56-0.](#)
- [H.R. 4570, the "Private Placement Improvement Act"](#) – After the 2011 JOBS Act eliminated the ban on general solicitations by issuers, including private funds, the SEC [proposed new rules](#) on issuers (including private funds) that undertake 506(c) general solicitations. This bill would amend Reg D in several ways, including prohibiting the Investment Company Sales Literature provisions of Rule 156 from applying to private funds and clarifying that a "knowledgeable employee" of a private fund is also considered an "accredited investor." [Passed by a vote of 31-28.](#)
- [H.R. 4554, "Restricted Securities Relief Act"](#) – The bill would reduce from 6 months to 3 months the mandatory holding period for restricted securities in SEC Rule 144 offerings. [Passed by a vote of 29-28.](#)
- [H.R. 4568, "Small Company Freedom to Grow Act"](#) – The bill would amend the Form S-1 to allow smaller reporting companies to incorporate by reference documents filed with the SEC after the effective date of the S-1. It would also amend the form S-3 to benefit smaller reporting companies. [Passed by a vote of 32-26.](#)
- [H.R. 4571, "Encouraging Employee Ownership Act of 2014"](#) – Requires the SEC to increase the threshold for disclosures of certain risk factors relating to compensatory benefit plans from \$5 million to \$20 million. [Passed by a vote of 36-23.](#)
- [H.R. 4569, "Disclosure Modernization and Simplification Act"](#) – Would modernize the SEC disclosure rules by permitting issuers to submit on Form 10-K annual reports a summary page to make annual disclosures easier to understand for current and prospective investors. Would also reduce Reg S-K disclosures for emerging growth companies and smaller issuers. [Passed by a vote of 59-0.](#)

A video of the markup is [here](#) and the Committee Memorandum describing the various bills is [here](#).

[Hearing on FSOC Designation](#) – Late last month, the HFSC held a hearing on [H.R. 4387](#), the "FSOC Transparency and Accountability Act," which would make several changes to the Financial Stability Oversight Council (FSOC) and make FSOC hearings open. Witnesses were:

- [Paul S. Atkins](#), CEO, Patomak Global Partners
- [William McNabb](#), CEO, Vanguard, on behalf of the Investment Company Institute
- [Eugene Scalia](#), Partner, Gibson, Dunn & Crutcher
- [Deron Smithy](#), Treasurer, Regions Bank, on behalf of the Regional Bank Coalition
- [Peter J. Wallison](#), American Enterprise Institute
- [Michael Barr](#), Professor, University of Michigan

The Committee Memorandum is [here](#), and a link to a video of the hearing (Parts 1 and 2) is [here](#).

House Small Business Committee

The HSBC held two interesting hearings late last month:

[Oversight Hearing](#) – Late last month, the HSBC holds an oversight hearing on the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. Witnesses were:

- [John Clanton](#), CEO, Lynntech, Inc.
- [Cartier Esham](#), EVP, Biotechnology Industry Organization
- [David H. Finifter](#), Professor, The College of William and Mary
- [Robert Schmidt](#), Chairman, Cleveland Medical Devices, on behalf of the Small Business Technology Council

A copy of the Hearing Memo is [here](#) and a video of the hearing is [here](#).

[Hearing on Small Business Exporters](#) – HSBC also held a hearing on [barriers facing small business exporters](#). The purpose of the hearing was to examine the challenges small businesses face in combating unfair international trade practices, such as dumping, intellectual property theft, currency manipulation and non-tariff barriers to trade.

The Senate

Senate Agriculture Committee

[Hearing on High Frequency Trading](#) – Last month the HAC held a hearing entitled “High Frequency and Automated Trading in Futures Markets,” which examined high-frequency trading and other forms of automated trading in the derivatives markets and what the CFTC can do to help ensure market integrity. Witnesses were:

- [Vince McGonagle](#), Director of the Division of Market Oversight, CFTC
- [Terrence Duffy](#), Executive Chairman and President, CME Group
- [Dr. Andrei Kirilenko](#), MIT Sloan School of Management

Senate Banking Committee

[Hearing on Student Loan Servicing](#) – On Wednesday of this week, SBC holds a hearing entitled “Student Loan Servicing: The Borrower’s Experience.” Witnesses will include:

- Nancy Hoover, Director of Financial Aid, Denison University
- Will Hubbard, Vice President of External Affairs, Student Veterans of America
- Robert Geremia, on behalf of the American Federation of Teachers (AFT)

Senate Appropriations Committee

[Hearing on FY 2015 Funding for SBA](#) – The Financial Services Subcommittee held a hearing on FY 2015 funding for both the Small Business Administration, which oversees the popular Small Business Investment Company (SBIC) program, and the Community Development Financial Institutions (CDFI) Fund. Witnesses were:

- [Maria Contreras-Sweet](#), Administrator, U.S. Small Business Administration
- [Amias Gerety](#), Acting Assistant Secretary, U.S. Department of the Treasury

The issue of SBIC funding did not come up during the hearing. A link to a webcast of the hearing is [here](#).

The Administration

Department of Labor Delays Fiduciary Rule

The Department of Labor announced via its [regulatory agenda](#) last week that it plans to issue its new fiduciary standards for retirement plan advisers sometime in 2015 instead of August of this year. A link to the agency’s proposed rule is [here](#). Practitioners are concerned about market confusion if investment advisers who advise retail customers regarding retirement plans are subject to a fiduciary duty while other advisers are not subject to such a duty.

FSOC Hearing on Asset Management

On May 19, the Financial Stability Oversight Council [held a public conference](#) on the asset management industry at the Department of the Treasury. The conference consisted of three panels: Investment Risk Management by Asset Management Firms, Asset Management and Risks Across the Broader Financial System, and Operational Issues and Resolvability. An agenda for the conference is [here](#) and a video of the conference itself is [here](#).

Increased Focus on Climate Change

The President used his weekly address yesterday to discuss [reducing carbon pollution in domestic power plants](#). This comes on the heels of the May 6th release of the Administration’s release of the [Third U.S. National Climate Assessment](#) and in advance of the expected release today of new EPA rules regulating power plant emissions of carbon dioxide.

Securities and Exchange Commission

Major Speech on Private Equity Compliance Shortcomings

Andrew J. Bowden, Director of the Securities and Exchange Commission’s [Office of Compliance Inspections and Examinations](#) (OCIE) delivered a major speech entitled [“Spreading Sunshine in Private Equity.”](#) In the speech Director Bowden describes multiple

areas in which OCIE examiners have observed deficiencies in private equity advisers fulfilling their obligations under the Investment Advisers Act. Problem areas mentioned in the speech include:

- Vague limited partnership agreements
- Fees and expenses relating to a variety of areas, such as
 - Co-Investments - Allocation of transaction-related fees and expenses (including break-up fees)
 - Operating Partners - Charging "operating partner" salaries and overhead to the fund or portfolio company, while simultaneously presenting operating partners as members of the adviser's team
 - Fee shifting Expenses from GP to LP; and
 - "Hidden" Fees – Receiving "hidden" fees, such as monitoring fees, under agreements that are not adequately disclosed to investors; and
- Valuation

The speech puts private equity advisers on notice that the SEC will be paying very close attention to these issues in current and future examinations. Fund advisers should review their compliance procedures and fund documents to ensure they are complying with their obligations under the Advisers Act. Venable can conduct a risk assessment for fund managers and help managers comply with the IAA obligations, so please let me know if you have any questions. A link to Venable's full summary of the speech is [here](#).

Association for Corporate Growth (ACG)

Launch of Middle Market Growth Caucus

The Association for Corporate Growth (ACG), together with GE Capital and the National Center for the Middle Market, helped [launch the Congressional Caucus for Middle Market Growth](#), the first Congressional Caucus focused exclusively on issues facing the middle market. Congressional sponsors of the Caucus are Congressmen Steve Stivers (R-OH), Jared Polis (D-CO), Brad Schneider (D-IL) and Tom Rice (R-SC).

2014 Policy Agenda

ACG released its [2014 policy agenda](#), which includes the organization's legislative and regulatory priorities. Top legislative priorities include H.R. 1105 (private equity fund registration under IAA), H.R. 2274 (M&A broker legislation), and protecting deductibility of interest on corporate debt in case of comprehensive tax reform. Top regulatory issues include broker-dealer issues for private equity funds, JOBS Act implementation, and improving the efficiency of SEC examinations.

Private Equity Growth Capital Council (PEGCC)

PEGCC Releases Quarterly Trends Report

The PEGCC releases its [quarterly trends report for Q1, 2014](#). The trends report finds that following a steady increase of activity in 2013, overall private equity activity declined in the first quarter of 2014. Investment volume and fundraising fell but still remain above their first quarter levels in the past five years. Similarly, exit volume declined but still outperformed first quarter performances in all years since 2005.

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