

Private Fund Update

January 13, 2014

NOTE: Webinar on Volcker Rule January 15: This Wednesday, January 15 (please note the change of date), I will be participating in a webinar on the Volcker Rule titled "[The Volcker Rule and its Impact on Private Equity](#)." The webinar will include an overview of the final rule and its compliance requirements, the impact of the rule on private equity funds and other "covered funds" and exclusions to the rule, including SBICs and most BDCs. Please feel free to register [here](#).



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Congress gets back to work in earnest this week. Of particular note, on Tuesday, the full House of Representatives [is expected to vote](#) on H.R. 2274, which would create a simplified reporting regime for merger & acquisition brokers.

This update reviews:

- SEC Examination priorities for 2014;
- House Financial Services Committee hearing on unintended consequences of the Volcker Rule;
- House Small Business Committee hearing of implementation of crowdfunding rules;
- The Association for Corporate Growth's 2014 Policy Summit, taking place on February 5, 2014;
- The SEC's recent interpretive guidance on the registered investment adviser exclusion for municipal advisers; and
- The SEC's 2014 Compliance Outreach seminar, taking place on January 30, 2014.

The 113th Congress

House of Representatives

On Tuesday, the full House of Representatives [will consider H.R. 2274](#), the Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act, which would create a simplified reporting regime for M&A brokers. The bill will be considered under Suspension of the Rules, which is generally reserved for non-controversial measures. The bill passed the Financial Services Committee by a [unanimous 57-0 vote](#) last year.

House Financial Services Committee

Chairman Hensarling released the Committee's [schedule for the month of January](#), which will include hearings on [the Fed's quantitative easing](#), [housing finance reform](#), [unintended consequences of the Volcker Rule](#) and overview of the consumer financial protection bureau (CFPB).

The big hearing this week is on the Volcker Rule:

[Hearing on Volcker Rule](#) – On Wednesday at 10:00 a.m., the full HFSC will hold a hearing entitled “[The Impact of the Volcker Rule on Job Creators, Part 1.](#)” A list of witnesses is not yet available.

House Small Business Committee

The HSBC holds two hearings this week, [one on peer-to-peer businesses](#) and another on the SEC’s crowdfunding proposal.

[Hearing on Crowdfunding](#) – On Thursday, the Subcommittee on Investigations, Oversight and Regulations will hold a hearing titled, “[SEC’s Crowdfunding Proposal: Will it Work for Small Businesses?](#)” The purpose of the hearing is to receive testimony from industry experts about how the SEC’s crowdfunding rules will help meet the JOBS Act goal of getting capital to small businesses. Witnesses are:

- Jason Best, Principal, Crowdfund Capital Advisors
- Daniel Gorfine, Director, Financial Markets Policy, Milken Institute
- DJ Paul, Co-Chair, Crowdfund Intermediary Regulatory Advocates

The hearing notice is [here](#), and it will be livestreamed [here](#).

The Senate

Senate Banking Committee

The SBC started off the year focused on the regulation of bank holding companies.

[Hearing on Government Support for Bank Holding Companies](#) – Last week 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.

[Hearing on Regulating Financial Holding Companies and Physical Commodities](#) – On Wednesday at 2:00 p.m., the SBC holds a hearing on proposed regulations regarding the ability of financial holding companies to own physical commodities. Witnesses are:

- Mr. Norman Bay, Director, Office of Enforcement, FERC
- Mr. Vince McGonagle, Director, CFTC
- Mr. Michael S. Gibson, Director, Board of Governors of the Federal Reserve System

Securities and Exchange Commission

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 to 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.

Guidance on Registered Investment Adviser Exclusion to Definition of Municipal Adviser

The SEC issued [interpretive guidance](#) in the form of questions and answers regarding the final rules governing the registration of municipal advisers. Of note to private funds, the guidance makes clear that the exclusion of registered investment advisers from the definition of a municipal advisers is intended to

be broad, and registered investment advisers are only considered “municipal advisers” 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, staff stated that it would not object if SEC-registered investment advisers (who provide advice on municipal derivatives in an investment portfolio for clients who are municipal entities or obligated persons) do not register with the Commission as municipal advisers.

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 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](#).

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.

Commodity Futures Trading Commission (CFTC)

Request for Public Comment and Extended No Action Relief re: Cross-Border Transactions

In November of last year, the CFTC [issued a controversial advisory opinion](#) stating that Dodd-Frank transaction-level requirements apply to swaps between a non-U.S. swap dealer (whether an affiliate or not of a U.S. person) and a non-U.S. person if the swap is arranged, negotiated, or executed by personnel or agents of the non-U.S. swap dealer located in the United States. The CFTC [has requested public comment](#) on the advisory opinion. On January 3, the CFTC also [extended the no action relief](#) under the advisory opinion to September 15, 2014.

Meeting of Technology Advisory Committee

On Tuesday, January 21, the CFTC will hold a meeting of its Technology Advisory Committee. Topics to be covered during the meeting include the Commission’s [concept release on automated trading environments](#).

Weekly Swaps Report

Here is a link to the CFTC’s [Weekly Swaps Report](#) for the week ending December 27, 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 President [unveiled the first five promise zones](#) in America, which include the cities of Los Angeles, Philadelphia, and San Antonio, as well as rural Kentucky and the Choctaw Nation of Oklahoma. The President hopes to increase the number of zones to twenty before he leaves office.

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 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)

Ken Mehlman Elected Chairman of the PEGCC

[Ken Mehlman was elected Chairman](#) of the Private Equity Growth Capital Council's Board of Directors. Mr. Mehlman serves as a Member and Global Head of Public Affairs at KKR, a founding member of the PEGCC. He succeeds Mark Tresnowski, Managing Director and General Counsel at Madison Dearborn Partners.

Miscellaneous

Chamber's State of American Business 2014

Chamber of Commerce President Tom Donohue gave his [State of American Business 2014](#) speech in which he, among other things, indicated the Chamber would be willing to go to the courts to stop excessive actions by regulators in implementing the Dodd-Frank Act and other statutes.

Sen. Joe Lieberman Joins Victory Park

Former Senator Joe Lieberman [joined the private equity firm](#) Victory Park Capital as chairman of the firm's executive board. Victory Park provides customized financing solutions to, and makes control investments in, middle-market companies across a diversified range of industries, typically with revenue up to \$250 million.

If you would like to opt out of receiving this communication, just let me know.