

# Private Fund Update

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**Note:** The head of the SEC's Office of Compliance Inspections and Examinations recently [gave a speech](#) (details 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.

I and other Venable attorneys 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](mailto:sgluck@Venable.com).

Both the Senate and the House are in session for what should be a busy week. This update includes:

- The major speech given by Andrew Bowden, Director of the SEC's Office of Compliance Inspections and Examinations (OCIE), on the compliance shortcomings his office is observing in the private equity industry;
- Today's Financial Stability Oversight Counsel (FSOC) conference on the asset management industry;
- The House Financial Services Committee markup covering over a dozen potential JOBS Act 2.0 bills; and
- The SEC's recent Risk Alert on marijuana-related publicly traded companies.

Have a great week, and again please [email me](#) 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 113<sup>th</sup> Congress

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### House of Representatives

#### House Financial Services Committee

[Markup on JOBS Act 2.0 Legislation](#) – Before going on recess, the HFSC held a lengthy markup of over a dozen different bills, several of which are relevant to private funds and SBICs. Votes on many of the bills were postponed to this week. Here is a summary of what took place with some of the bills:

- [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

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million in assets under management. *Recorded vote pending.*

- [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." *Recorded vote pending.*
- [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. *Recorded vote pending.*
- [H.R. 4568](#), "Small Business 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. *Recorded vote pending.*
- [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. *Recorded vote pending.*
- [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. *Recorded vote pending.*

A video of the hearing is [here](#) and the Committee Memorandum is [here](#).

[Hearing on FSOC Designation](#) – On Tuesday, the HFSC will hold a hearing on [H.R. 4387](#), which would make several changes to the Financial Stability Oversight Council (FSOC) and make FSOC hearings open. Witnesses are:

- Paul S. Atkins, CEO, Patomak Global Partners
- F. 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

The Committee Memorandum is [here](#).

This week, the HFSC also has hearings on legislative proposals to [reform federal insurance policy](#) and [eleven different bills regarding the CFPB](#).

#### House Small Business Committee

The HSBC holds two interesting hearings this week:

[Hearing on Small Business Exporters](#) – On Thursday, HSBC will hold a hearing on barriers facing small business exporters. The purpose of the hearing is 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.

[Oversight Hearing](#) – On Wednesday, the HSBC will hold an oversight hearing on the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs.

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## The Senate

### Senate Agriculture Committee

[Hearing on High Frequency Trading](#) – Last week, the SAC held a hearing titled "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 Job Creation](#) – The SBC recently held a hearing titled "Drivers of Job Creation." Witnesses were:

- [Jennifer Erickson](#), Director, Center for American Progress
- [Derek Smith](#), CEO, Clean Energy Works Oregon
- [Emil Frankel](#), Visiting Scholar, Bipartisan Policy Center
- [Robert Dietz](#), Vice President, National Association of Home Builders
- [Thomas Buffenbarger](#), President, International Association of Machinists and Aerospace Workers

### Senate Finance Committee

[Discussions on Tax Extenders Continues](#) – Negotiations continue between Chairman Ron Wyden and Ranking Member Orrin Hatch regarding S. 2260, the Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act, which would, among other things, extend the research and experimentation tax credit for two years.

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## The Administration

### **FSOC Hearing on Asset Management Industry Today**

The Financial Stability Oversight Council [will hold a public conference](#) later today on the asset management industry and its activities in the Cash Room at the Department of the Treasury. The conference will consist of three panels, each of which will be moderated by a senior government official. Mary Miller, Under Secretary for Domestic Finance at the Treasury, will give the opening and closing remarks. An agenda for the conference is [here](#).

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## 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 titled "[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;

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- Valuation;
  - 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;
    - Shifting fee expenses from GP to LP; and
    - "Hidden" Fees – Receiving "hidden" fees, such as monitoring fees, under agreements that are not adequately disclosed to investors.

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](#).

#### **Investor Alert Issued on Marijuana-Related Publicly Traded Companies**

Last week the SEC [issued an Investor Alert](#) on marijuana-related publicly traded companies. The SEC noted that in the past few weeks it had issued temporary trading suspensions for the common stock of five different companies that claim their operations relate to the marijuana industry. The SEC suspended trading in these companies because of questions regarding the accuracy of publicly available information about these companies' operations. For two of the companies, the trading suspensions were also based on potential illegal activity (unlawful sales of securities and market manipulation).

## **Association for Corporate Growth (ACG)**

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### **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.

## **Small Business Investor Alliance (SBIA)**

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### **Midwest Private Equity Conference – May 29 in Chicago**

The SBIA announced that it will be holding its [Midwest Private Equity Conference](#) at the Ritz-Carlton Water Tower in Chicago on Thursday, May 29. The Conference's keynote speaker is Chicago Cubs Chairman and Owner and Incapital, LLC Chairman, Mr. Tom Ricketts.

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