Private Fund Update

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Note: This Thursday, February 20, ACG and Venable are hosting a free webinar with David Blass, Chief Counsel for the SEC's Division of Trading and Markets regarding its recent No Action Letter on M&A brokers. This is a great opportunity to get insight from, and ask questions of, the author of the No Action Letter.

We've seen several interesting non-fund developments at the federal agencies this week, including FinCENs guidance on banking with marijuana-related companies, NIST's new cybersecurity proposal, and Treasury's decision to delay aspects of the Affordable Care Act. Venable tracks these and a wide range of other regulatory issues, so please contact me for more information.

This update includes:

- The SEC's 2014 PCOAB Budget and Accounting Support Fee;
- Changes at the Senate Finance and Small Business Committee;
- The Private Equity Growth Capital Council's 2013 Annual Report and Trends Report showing increased private equity activity in Q4; and
- A Pitchbook report on private equity branding.

The 113th Congress

House of Representatives

This week, the full House of Representatives passed H.R. 3448, the "Small Cap Liquidity Reform Act of 2013," by a vote of 412-4 (the four Representatives who voted against it were Reps. Fortenberry, Jones, McClintock and Stockman, all Republicans). The bill creates a pilot program to allow the securities of emerging growth companies with total annual gross revenues of less than $750 million to be traded at either $0.05 or $0.10 increments.

Interestingly, the SEC Investment Advisory Committee has come out against the legislation on the grounds that it would increase costs for retail investors and unduly benefit financial intermediaries, which could hamper the ability of the bill to make progress in the Democrat-controlled Senate.

House Financial Services Committee

Hearing with Janet Yellen on Monetary Policy – Just before the big storm swept in last week, the HFSC held a two-panel hearing on "Monetary Policy and the State of the Economy." Witnesses were:

Panel I

- The Honorable Janet L. Yellen, Chairman, Board of Governors of the Federal Reserve System

Panel II

- Dr. John B. Taylor, Professor of Economics, Stanford University

- Dr. Mark A. Calabria, Director, Financial Regulation Studies, Cato Institute
- Ms. Abby M. McCloskey, Director, Economic Policy, American Enterprise Institute
- Dr. Donald Kohn, Senior Fellow, Economic Studies, Brookings Institution

A video of the hearing is here and the Committee Memorandum is here.

The Senate

Two significant personnel changes resulted from the retirement of Senator Max Baucus. Senator Ron Wyden (D-OR) officially took over as Chairman of the tax-writing Senate Finance Committee, and Senator Maria Cantwell (D-WA) assumed the Chairmanship of the Senate Small Business Committee.

Senate Banking Committee

Meeting with Janet Yellen Postponed – SBC had to postpone its meeting with Janet Yellen, new Chair of the Board of Governors of the Federal Reserve, because of the weather. It has not yet been rescheduled.

Securities and Exchange Commission

No Action Letter on M&A Brokers – Webinar This Thursday

As noted above, David Blass, Chief Counsel of the Division of Trading and Markets, and his colleague Darren Vieira will be participating in a free webinar this **Thursday, February 20 at 11:00 a.m.** to discuss the No Action Letter and answer any questions that you might have. You can register for the webinar here.

This comes as the SEC's Division of Trading and Markets recently issued a long-awaited No Action Letter regarding M&A Brokers. The letter confirms that M&A brokers (defined as individuals engaged in the business of effecting securities transactions solely in connection with the transfer of ownership and control of a privately-held company to a buyer that will actively operate the company or business) do not need to register as broker-dealers.

2014 PCOAB Budget and Accounting Support Fee

The SEC approved the 2014 budget of the Public Company Accounting Oversight Board (PCAOB) and related annual accounting support fee, as required under Sarbanes-Oxley. The PCAOB budget totals $258.4 million and will be funded primarily by the collection of an accounting support fee totaling $252 million. Of the $252 million support fee, $225.4 million comes from public companies and $26.6 million from broker-dealers. The formal order approving the budget is here.

Cybersecurity Roundtable to be Held on March 26

The SEC announced that it will be holding a cybersecurity roundtable discussion on March 26 at its offices in Washington, DC. The roundtable will be open to the public and also webcast live on the SEC's website. Details and an agenda to follow.

Staff Changes at the SEC

The SEC announced a number of staff changes. Rick Fleming will be the first head of the agency's Office of the Investor Advocate, where he will lead the office charged with assisting retail investors in interactions with the Commission and SROs; analyzing the impact of SEC rules; identifying problems that investors have with financial service providers and investment products; and proposing potential changes to the regulations. He is currently deputy general counsel with the North American Securities Administrators Association (NASAA) and starts on Feb. 24, 2014.

Also, Elizabeth Murphy was named an associate director in the Division of Corporation Finance, where she will oversee the work of three offices within the division: the Office of Rulemaking, the Office of Small Business Policy, and the Office of Enforcement Liaison. David Fredrickson was named associate director and chief counsel in the agency's Division of Corporation Finance, which oversees certain aspects of JOBS Act implementation. Michael F. Maloney was named the new chief accountant in the Division of Enforcement and Paul Leder was named director of the Office of International Affairs, which advises the Commission on cross-border enforcement and regulatory matters and coordinates the SEC's involvement with regulatory authorities outside the U.S.

Commodity Futures Trading Commission (CFTC)

Global Markets Advisory Committee Meeting Held

The CFTC's Global Markets Advisory Committee met last week to discuss a number of pressing issues, including the CFTC staff advisory issued on November 14, 2013 related to the CFTC's cross-border guidance. Topics for discussion included whether a non-U.S. swap dealer (SD) must comply with Dodd-Frank's Transaction-Level Requirements when entering into a swap with a non-U.S. person if the swap is arranged, negotiated, or executed by agents of the non-U.S. SD located in the United States. An audio recording of the hearing is not yet available.

Meeting of Technology Advisory Committee on February 10

The CFTC's Technology Advisory Committee held a public meeting on Monday, February 10. Topics included the Commission's concept release on automated trading environments, swap execution facilities, and swap data reporting. Lots of good information is available on swap data reporting, high-frequency trading, and swap package transactions.

Weekly Swaps Report

Here is a link to the CFTC's Weekly Swaps Report for the week ending January 31, 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

Federal agencies were busy last week, releasing a lot of items that, although not directly related to private equity funds, will have a big impact on them. The Department of Treasury's Financial Crimes Enforcement Network (FinCEN) released guidance on banking with marijuana-related companies, which may open the door for marijuana-related businesses to actually work with federally chartered banks. NIST released a new cybersecurity proposal and Treasury issued a final rule that delayed implementation of certain aspects of the Affordable Care Act.

Congressional Budget Office (CBO)

Budget and Economic Outlook 2014 to 2024

CBO released its lengthy Budget and Economic Outlook for 2014 to 2024, which projects that the federal deficit will total $514 billion in fiscal year 2014, compared with $1.4 trillion in 2009. This equals 3% of the nation's GDP — close to the average percentage of GDP seen during the past 40 years. CBO projects that the economy will grow at a solid pace until 2017, at which time growth will diminish and deficits will increase, topping $1 trillion per year starting in 2022.

The part of the report that generated controversy is the finding that the Affordable Care Act would effectively *reduce* the number of workers by 2.5 million in 2024 – looking at the number of "full time equivalent" positions, or in other words, the cumulative lost man-hours of work attributable to the ACA. A slide presentation summarizing the report is here.

Small Business Investor Alliance (SBIA)

SBIC Regulations Class on June 12

The SBA/SBIC will be holding an SBIC registration class on June 12 at the Hilton Gardens Inn in Washington, DC. The purpose of this class is to familiarize SBIC principles with the SBIC rules, regulations, and compliance procedures. Classes are limited in size and a licensed SBIC may not draw down leverage until all principles have completed the training.

Financial Stability Oversight Council (FSOC)

Telephonic Closed Meeting Held to Discuss Non-Bank Financial SIFI Designation

The Financial Stability Oversight Council held a closed-session meeting via telephone on Thursday. The meeting covered, among other things, FSOC's ongoing debate over whether to designate certain non-bank financial institutions as systemically important.

Miscellaneous

Academic Study on Direct Investing in Private Equity

Three professors did the first large-sample study of direct private equity investments by institutional investors. The study examines seven large institutional investors over 20 years, and finds that even with the substantial fee discounts, there is little evidence of attractive relative performance by direct investments. In particular, co-investments underperform traditional fund investments perhaps because of fund managers' selective offering of deals at market peaks as co-investments. The performance of both co-investments and solo investments deteriorated sharply in the 2000s, suggesting that any information advantage may have disappeared as the private equity industry became more competitive. Overall, our evidence suggests that institutional investors may find it difficult to capture the rents earned by private equity managers by investing directly.

Pitchbook Report on Private Equity Branding

Pitchbook and BackBay Communications released a white paper on private equity branding. The companies surveyed 290 private equity general partners, limited partners, funds-of-funds, advisors, and consultants serving the private equity industry in the U.S. and Europe concerning their attitude and approach to branding. It found that there was near unanimity (98%) about the importance for private equity firms to have a strong brand. 92% said a strong brand helps private equity firms source deals, with a similar proportion saying it helps them raise new funds. Four in five (81%) also said a strong private equity brand helps attract and retain talent.

EY 2014 Global Private Equity Survey

Ernst & Young released its 2014 Global Private Equity Survey, a survey of private equity chief financial officers. Interestingly, the report finds that CFOs are positive regarding near-term growth. Nearly four of five CFOs responded that their firm recently finished raising a fund, expected to raise another fund in the next three years, and believed that the new fund will be of equal or greater value than the last. Respectful of the industry's bullish opinion on growth, finance executives are acutely aware that successful operating models rest on their ability to proficiently manage resources and costs.

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