



ML Strategies Update

ML
STRATEGIES

Jason Rosenstock
JRosenstock@MLStrategies.com

Abby Matousek
Amatousek@MLStrategies.com

Follow us on Twitter: [@MLSFInRegUpdate](https://twitter.com/MLSFInRegUpdate) and [@MLStrategies](https://twitter.com/MLStrategies)

ML Strategies, LLC
701 Pennsylvania Avenue, N.W.
Washington, DC 20004 USA
202 296 3622
202 434 7400 fax
www.mlstrategies.com

MAY 20, 2013

Financial Services Legislative and Regulatory Update

Leading the Past Week

The conflation of three scandals clearly tainted President Obama with the Washington Post's "Worst Week in Washington" award last week, and in fact the only question last week at all had to be who was more pleased: Republicans -- who finally have a chance to extract political vengeance (assuming they don't [overplay their hand](#)), or the folks at [Bloomberg](#), who have to be breathing a sigh of relief that 1/3 of all Congressional committees are scheduled to investigate the President next week, leaving little oxygen in DC for the company's terminal spying scandal.

Of the three scandals, it would seem that the IRS scandal may be the [most damaging](#), as it threatens to overtake the President's legislative agenda, even beyond the implementation of the health care law or the consideration of comprehensive tax reform. At this point, the [conventional wisdom](#) is that comprehensive tax reform, which was already struggling, is likely to be strangled by the scandal. On the other hand, [a plausible argument could be made](#) that although the scandal diverts short-term attention away from reform efforts, in the long run it only strengthens the need and justification for reform. Clearly this will need some more time to fully play out.

This past week also saw a major milestone in the implementation of the Dodd-Frank Act, with the CFTC finalizing long-awaited rules about how Swap Execution Facilities will be allowed to operate. Also, in other Dodd-Frank related news, all eyes will be on the Senate floor later this week as the Senate is expected to consider the nomination of Richard Cordray to remain head of the CFPB.

Legislative Branch

Senate

Reid Planning Vote on Cordray Nomination This Week

Last week, a spokesperson for Senate Majority Leader Reid (D-NV) confirmed that Reid will bring up the nomination of Richard Cordray to head the CFPB the week of May 20th. The Cordray vote will be among the final items up for consideration before the Memorial Day

Recess, along with the Farm Bill. In what can only be viewed as bad timing, the Cordray vote will come off the heels of the [3rd Circuit Court of Appeals](#) invalidating similarly situated NLRB appointments that will only serve to harden Republican opposition. Regardless, everything points to Leader Reid pushing for a vote on the nomination of Cordray.

Senate Banking Subcommittee Examines Implementation of Cross-Border Resolution

On May 15th, the Senate Banking Subcommittee on Security and International Trade and Finance held a hearing to examine the progress of cross-border orderly resolution. The hearing was sparsely attended, with only Chairman Warner present to question witnesses. Witnesses from the Fed Division of Banking Supervision and Regulation, the Treasury Office of International Banking and Securities Markets and the FDIC Office of Complex Financial Institutions discussed the progress made so far in implementing Title I and Title II Dodd-Frank Act provisions around orderly liquidation authority (OLA) and bankruptcy resolution through living wills. Witnesses also addressed international coordination on implementation of resolution schemes, highlighting U.S. cooperation with the Bank of England and EU and individual European countries' efforts to design resolution mechanisms. The same day, FDIC Chairman Martin Gruenberg said that the agency has been "actively engaging" with Swiss and Japanese financial regulators and that he believes there is "actually potential for the U.S., the U.K. and the Swiss to collaborate together on cross-border resolution."

Senate Finance Committee Releases Tax Reform Paper on Economic and Community Development

On May 15th, the Senate Finance Committee [released](#) its most recent in a [series](#) of tax reform options papers titled "Economic and Community Development." The proposals outlined in the paper seek to provide a set of principles for lawmakers, highlighting simplification, equitability, efficiency, and cost-benefit considerations. Specifically, several proposals considered in the paper addressed the deduction for interest on home loans. While the paper offered a variety of possible ways to address the mortgage interest deduction, including gradual repeal and conversion to an above-the-line deduction, Ranking Member Orrin Hatch (R-UT) has predicted that these deductions would likely be more limited under tax reform. Other proposals around housing policy included doing away with the exclusion for capital gains on selling a residence over 10 years.

Franken Introduces Arbitration Fairness Act

Senator Al Franken (D-MN) introduced legislation, the Arbitration Fairness Act of 2013 ([S. 878](#)), which would make pre-dispute arbitration agreements invalid and unenforceable with respect to securities, banking, employment, antitrust, and civil rights disputes. The legislation follows a [letter](#) sent by Franken and a group of 37 Senate and House Democrats urging the SEC to ban forced arbitration agreements in broker-customer contracts, in comes in response to a recent Supreme Court decision. A SEC spokesman declined to comment on Franken's bill; however, FINRA has long held that the question of whether mandatory arbitration should be allowed is a decision for Congress and the SEC to make. Interestingly, also this week, Charles Schwab, whose contract provisions requiring compulsory arbitration for class actions is at the heart of this issue [announced](#) that it was temporarily reversing its policy for the time being.

Warren Requests Information on Settlement without Admission of Guilt

On May 14th, Senator Elizabeth Warren (D-MA) [wrote](#) to Chairman Bernanke, Attorney General Holder and Chairman White requesting the Fed, DOJ and SEC submit any analysis of research they may have conducted on out-of-court bank settlements. Warren's letter noted concern that these out-of-court settlements don't require the bank to admit guilt, saying not taking these large financial institutions to trial leaves the regulator with "a lot less leverage in settlement

negotiations and will be forced to settle on terms that are much more favorable to the wrongdoer.” The same week, Holder told lawmakers in the House Judiciary Committee that his remarks on “too big to jail” banks were misconstrued and that there is no institution that cannot be prosecuted by the DOJ but that it is “difficult at times to bring cases against large financial institutions because of the consequences they can have on the financial system.”

Harkin Introduces Bill to Reinstate Wall Between Commercial Banking and Securities

On May 16th, Senator Tom Harkin (D-IA) introduced S. 985, a bill to repeal certain provisions of the Gramm-Leach-Bliley Act and revive the separation between commercial banking and the securities business, in the manner provided in the Banking Act of 1933, also known as the Glass-Steagall Act.

House of Representatives

White Testifies Before House Financial Services Committee

On May 16th, SEC Chairman White testified before the House Financial Services Committee, defending the agency’s budget request. White argued before lawmakers that the 27 percent budget increase the agency is seeking is necessary to ensure the SEC can tackle new and existing regulatory tasks such as increased examinations of investment advisers, increased enforcement actions, and continued implementation of the Dodd-Frank and JOBS Act. Notably, Committee Chairman Emeritus, Spencer Bachus (R-AL) broke with his party and gave a statement in support of increasing the SEC’s budget to reflect the new responsibilities of the JOBS Act and Dodd-Frank Act. Bachus told White he believes it “it would be penny wise and pound foolish for there not to be some bipartisan agreement for a funding increase.”

Another hot topic at the hearing was whether the SEC is considering a policy that would require publically traded companies to disclose political contributions. Committee Republicans warned White against entering the political area, citing the ongoing IRS scandal as a cautionary tale. Responding to Representative Scott Garrett (R-NJ), who asked White to make clear whether the SEC will pursue this course, White told lawmakers that agency staff members are reviewing the petition to require this disclosure and she will not “prejudge” the issue without staff analysis. Still, White suggested action on political disclosure is not imminent and there is no proposed rule in the works. She also addressed her concerns about Congressman Garrett’s cost-benefit analysis bill (see more below).

House Financial Services Subcommittee Charges Dodd-Frank Title II with Perpetuating Too Big to Fail

On May 15th, the House Financial Services Oversight and Investigations Subcommittee met to discuss Title II of the Dodd-Frank Act and the question of whether firms remain “too big to fail.” Chairman of the Subcommittee Patrick McHenry (R-NC) asked witnesses to comment on whether Title II, which includes orderly liquidation authority (OLA), provides systemically important financial institutions (SIFIs) with an unfair advantage. Witness David Skeel, a Professor of Corporate Law with the University of Pennsylvania Law School, told lawmakers that Dodd-Frank’s OLA authority merely perpetuates the problem of too big to fail because a failing megabank’s subsidiaries would be transferred by regulators to a bridge company which would have special advantages over other firms, including access to government funding and tax incentives. Other witnesses included: John Taylor, Economic Professor with Stanford University, Joshua Rosner, Managing Director of Graham Fisher & Co., and Michael Krimminger, Partner, Cleary Gottlieb. Witnesses also warned that in order to avoid further taxpayer bailouts, the FDIC will have to exercise considerable discretion in reorganizing failed banks and that Title II rewards banks for becoming systemically important.

House Votes on SEC Cost-Benefit Analysis Bill

On May 17th, the House voted on the SEC Regulatory Accountability Act ([H.R. 1062](#)). The legislation was approved by the House in a 235 to 161 vote. During consideration of the bill, the House also adopted an amendment to the bill that would require other rulemaking bodies under the SEC's supervision, such as the Public Company Accounting Oversight Board and the Financial Industry Regulatory Authority, to abide by the same cost-benefit requirements as the SEC. Earlier in the week, SEC Chairman White told lawmakers that she has "concerns" about how additional new requirements would affect the agency's rulemaking process. White said, though she is a "firm supporter of rigorous economic analysis," she is concerned that the legislation would affect the agency's ability to carry out "rulemaking functions expeditiously." The Obama Administration issued a Statement of Administration Policy (SAP) in opposition to the legislation which, it says, would add "onerous procedures that would threaten the implementation of key reforms related to financial stability and investor protection." Despite the White House's statement, 17 Democrats crossed the party to vote in favor of the measure.

Financial Services Subcommittee Examines Sustainable Housing Finance

On May 16th, the House Financial Services Subcommittee on Housing and Insurance held a hearing titled, "Sustainable Housing Finance: The Government's Role in Multifamily and Health Care Facilities Mortgage Insurance and Reverse Mortgages." Witnesses included representatives from the FHA: Charles Coulter, Deputy Assistant Secretary for Single-Family Housing, Marie Head, Deputy Assistant Secretary for Multi-Family Housing, and Roger Miller, Deputy Assistant Secretary for Healthcare Programs.

House Passes Bill Directing SEC to Finalize Rules Exempting Small Businesses from Registration

On May 15th, the House passed H.R. 701 under suspension of the rules in a 416 to 6 vote. The bill would require that the SEC finalize a Jumpstart Our Business Startups (JOBS) Act rule to exempt "small-issue" companies from most SEC filing and registration requirements. Under the bill, by October 31, 2013 the SEC would be required to have in place regulations exempting small companies making initial IPOs of up to \$50 million in a 12-month period, allowing them to use a simplified Reg A threshold.

Lawmakers Urge SEC to Scale Back Municipal Adviser Definition

On May 10th, Representatives Gwen Moore (D-WI) and Steve Stivers (R-OH) [wrote](#) to the SEC, urging Chairman White to issue municipal adviser regulations that are in line with their legislation, [H.R. 797](#), the Municipal Advisor Oversight Improvement Act of 2013. The bill would clarify that Section 975 of the Dodd-Frank Act defines municipal advisers as those engaged with issuers to provide financial advice for compensation and seeks to reign in the definition proposed by the SEC in December 2010. Moore and Stivers charge that the SEC's proposed rule "went far beyond the scope of Section 975 by encompassing entities and activities that Congress never intended to fall under the definition of municipal adviser."

Executive Branch

Federal Reserve

Fed Releases Instructions for Banks Required to Submit Midyear Stress Tests

On May 13th, the Fed released [instructions](#) for the 18 large banks required to submit midyear stress tests by July 5th. The Dodd-Frank Act required that large bank holding companies and non-bank financial institutions that are designated for Federal Reserve supervision conduct two stress tests each year. This will be the first time banks must conduct a midyear stress test which allow companies to design their own baseline and adverse and severely adverse models.

SEC

Moody's Predicts SEC Money Market Fund Proposal Will Have "Significant Impact"

According to a Moody's report released last week, new rules being considered by the SEC to govern the money market mutual fund industry will make funds safer for some at expense of forcing small providers out of business. According to iMoneyNet, imposing a floating net asset value (NAV) on prime funds would capture approximately \$939 billion, or 37 percent of the market. Still, the Moody's report said that, though the change would have a "significant impact," they do not know how broadly or narrowly a floating NAV would be applied. Moody's said the funds, which are already under pressure from low interest rates and fewer high rated investment opportunities, may see investors flee into alternatives such as bank accounts, and short-term bond funds.

CFTC

CFTC Approves SEFs, Block Swaps Rule

On May 16th, the CFTC held an open meeting to finalize two Dodd-Frank Act rulemakings, including voting 4 to 1 to [finalize long awaited rules](#) for swap execution facility (SEF) derivatives trading platforms. The final version of the SEF rule is a scaled back version of the proposed rule and lowers the proposed number of price quotes that companies operating trading platforms must seek to buy or sell swaps. Under previous proposals, companies would have to seek five quotes; under the final rule, they will only have to seek two during a yearlong transition period and three thereafter. Staff have said the looser transparency standard reflects comments concerned with a "winner's curse," in which disclosure would be used opportunistically and concerns expressed by JPMorgan, Deutsche Bank and other swaps sealers that the five quote requirement would increase trading costs and reduce liquidity. The final rule also eases requirements on what methods can be used to execute trades, allowing trades to be executed over the phone. Though the rule passed, it remained controversial for Commissioners, with Commissioner O'Malia offering a failed amendment and Commissioner Wetjen reiterating concerns that the rule necessitates more flexibility.

At the same meeting, the Commission approved in a 3 to 2 vote a [rule](#) that would allow firms to delay disclosing "block" swap trades. The final rule allows 14 percent of the trades in interest rate swaps and 15 percent in credit default swaps to qualify for the delay. Following a yearlong data collection period the percentages will be revised down to 6 percent for both swap categories. Both Republican Commissioners O'Malia and Sommers voted against the proposal, citing concerns that not enough data has been collected to determine the appropriate thresholds.

Federal Regulators Eye Bloomberg Terminal Issues

Federal regulators are taking notice following reports that Bloomberg News reporters inappropriately used the company's financial data terminals to access contact information and monitor activity to supplement news coverage. Bloomberg terminals are used by over 315,000 subscribers for instant market updates, trading information and communication. For example, Goldman Sachs registered concerns last month after a Bloomberg reporter, investigating possible staff changes, noted that a Goldman employee has not signed into the terminal in weeks. Among Bloomberg subscribers are the Federal Reserve, the FDIC, the OCC and the SEC. Notably, the CFTC, which also uses the terminals, may have jurisdiction over Bloomberg's potential indiscretions as a derivatives trading platform under swap execution facility rules finalized last week. Speaking on the scandal, Commissioner Bart Chilton said the issue merits further review and once Bloomberg is under CFTC jurisdiction "this is definitely something we'd go after."

HUD

FHA Aiming to Finalize QM Rule by End of June

Last week, it was reported that the FHA is aiming to publish its qualified mortgage (QM) rule by the end of June. Beginning in 2014, lenders will be required to follow a set of [CFPB guidelines](#) to ensure that borrowers have the ability to repay the mortgages. As the CFPB has yet to finalize a QM definition, HUD and FHA officials are seeking with their rulemaking to ensure that FHA borrowers are afforded the same protections.

Upcoming Hearings

On Tuesday, May 21st at 10am, in 538 Dirksen, the Senate Banking, Housing and Urban Affairs Committee will hold a hearing on the Financial Stability Oversight Council annual report to Congress.

On Tuesday, May 21st at 10am, in 1300 Longworth, the House Agriculture Committee will hold a hearing titled “The Future of the CFTC: Market Perspectives.”

On Tuesday, May 21st at 10am, in 2128 Rayburn, the House Financial Services Subcommittee on Financial Institutions and Consumer Credit will hold a hearing on the CFPB’s Ability to Repay/Qualified Mortgage Rule.

On Tuesday, May 21st at 2pm, in 2128 Rayburn, the House Financial Services Subcommittee on Monetary Policy and Trade will hold a hearing on the impact of the conflict minerals provision of the Dodd-Frank Act.

On Wednesday, May 22nd at 10am, in 2128 Rayburn, the House Financial Services Committee will hold a hearing on the Financial Stability Oversight Council’s annual report.

On Wednesday, May 22nd at 10am, in 216 Hart, the Joint Economic Committee will hold a hearing with testimony from Federal Reserve Chairman Ben Bernanke on the economic outlook.

On Wednesday, May 22nd at 2pm, in 2128 Rayburn, the House Financial Services Subcommittee on Oversight and Investigations will hold a hearing on how the Department of Justice determines whether a financial institution is “Too Big to Jail.”

On Thursday, May 23rd at 9:30am, in 2128 Rayburn, the House Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises will hold a hearing on Legislative Proposals to Relieve the Red Tape Burden on Investors and Job Creators.

* * *

[Click here to view ML Strategies professionals.](#)

Copyright © 2012 ML Strategies. All rights reserved.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

The distribution list is maintained at Mintz Levin's main office, located at One Financial Center, Boston, Massachusetts 02111. If you no longer wish to receive electronic mailings from the firm, please visit <http://www.mintz.com/unsubscribe.cfm> to unsubscribe.