Message from the Chair

Dear MMSB Committee Colleagues:

I am writing to you on the occasion of our Winter newsletter, one of two that we publish each year. It is full of timely information regarding our Committee activities along with news and articles that can aid your practice.

I am pleased to report that our Committee is doing extremely well. I recently received word that 51 lawyers joined our Committee during the last quarter! Our Listserv has become a robust discussion spot that can be used by members to seek advice and to make referrals to lawyers with specialized expertise. If you missed a conversation, or want to go back to see one which took place in the past, you can access our Listserv archives here.

To fully appreciate all the MMSB has to offer, get involved! You can do this in many ways, including:

- Attending our meetings and programs during the Business Law Section Spring Meeting (typically in late March or April and this year April 6-8 in New Orleans), Annual Meeting in September (this year September 14-16 in Chicago) or Fall Meeting in November (this year November 16-18 in Washington DC);
- Coming to our MMSB Committee lunch and dinner at our in-person meetings, where you will have the chance to meet business lawyers from around the world and make new friendships;
- Writing an article for our newsletter;
- Participating in the activities of our subcommittees and task forces; or
- Contributing your thoughts and expertise via our Listserv which is accessible via SMBIZ@mail.americanbar.org.

To find out more about the Committee, please visit our committee homepage.

Until we meet in New Orleans, all the best!

Thomas J. Walsh, Jr.
Chair, Middle Market and Small Business Committee
Business Law Section
What is the Middle Market and Small Business Committee, and What Do We Do?

A. Our Mission

The mission of the Middle Market and Small Business Committee ("MMSB Committee") is to serve, educate, and bring together corporate, transactional, and securities lawyers-in an effort to improve the legal profession-who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies.

Read more...

B. Committee Facts

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,400 members, both in the United States and abroad.
- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings.

Read more...

C. Areas of Expertise

Some of the specific areas that are frequently covered by the MMSB Committee in our panel presentations, programs (CLE and otherwise) and workshops include the following:

- Entity organization and owner agreements
- Capital formation, financing, and strategic partnering
- Employment and compensation matters
- Intellectual property protection and transference
- Corporate governance
- Securities law compliance
- International expansion and cross-border transactions
- Business combinations and M&A activities
- Business divorces, breakups, and restructurings

Start-Up Activity Series

A. Focus: Chattanooga, Tennessee

In our series highlighting start-up activities around the globe, April Holland shares with the MMSB Committee the activities occurring in Chattanooga, Tennessee:

Innovation in Chattanooga, Tennessee

By: April Holland, Associate, Miller & Martin, PLLC

Chattanooga, Tennessee, the Scenic City, made national headlines in 2012 when the Electric Power Board (EPB), a publicly-owned electric utility serving Chattanooga, achieved the lofty goal of providing city-wide access to the fastest internet in the country. EPB’s installation of a fiber optic network made available one gigabit per second internet speed to every residence and business in the city, making it the first city in the Western hemisphere to complete such a feat. In 2015, EPB clocked it up to 10 gigabits per second, the first internet service provider in the world to do so.
Within a two-hour drive of Atlanta and Nashville, Chattanooga is uniquely situated, nestled between mountains with access to world-class rock climbing, hiking trails, rivers, and lakes. With the low cost of living coupled with incredible internet connectivity, innovators are being drawn away from larger metropolitan markets to find a better quality of life in the Scenic City. The Tennessee River winds its way through the heart of downtown Chattanooga, not far from the aptly named Innovation District where venture funds like the Lamp Post Group, Chattanooga Renaissance Fund, The Jump Fund, and Blank Slate Ventures rub shoulders with startups and the service providers and organizations that serve them.

Read more...

B. FinTech Start-Ups

In our next article, Joseph Silvia examines the complex regulatory landscape facing start-ups in the financial services space:

Regulating FinTech

By: Joseph E. Silvia, Counsel, Schiff Hardin

Over the last few years, financial technology, commonly referred to as "FinTech," has been used to describe a multitude of firms, activities and capabilities for financial services. Some have posited that the firms representing FinTech are unregulated and in need of significant limitations akin to those restricting traditional providers of financial services. In fact, they are regulated and have a number of state and federal restrictions to which they are subject, depending on their activities.

In this article, my goal is to identify three of the biggest legal and regulatory challenges that FinTech firms encounter in financial services. The first challenge is the overall regulatory landscape for consumer financial services providers - a challenge in and of itself. The second one, and in many ways the one most connected to the consumer financial services landscape, is handling third-party relationships and vendor management. Finally, our third key challenge for many FinTech firms is compliance with the Bank Secrecy Act and anti-money laundering rules.

Read more...

Election Impact

A. Election Impact on Private Equity

Election Impact on Exempt Offerings and Private Fund Advisers

By: Mark Hobson, Principal, Hobson Firm

The results of the 2016 U.S. Presidential election have left many people wondering about the impact that President-elect Trump (and the Republican-controlled Congress) will have on the U.S. capital markets. What regulatory changes should start-ups and other smaller issuers, as well as advisers to private equity funds, expect to see in the foreseeable future, now that the election is over?

It is widely anticipated that the Trump administration will have a deregulatory focus, as evidenced in part by the selection of Paul Atkins, a conservative former Securities and Exchange Commission (the "SEC") commissioner, to head the President-elect's transition team for the SEC and other independent financial regulatory agencies. During his campaign, candidate Trump also stated that he
would dismantle or substantially revamp the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), which when enacted affected just about every part of the U.S. financial services industry, including the offer and sale of securities exempt from registration under the Securities Act of 1933, as amended (the “Securities Act”), and the regulation of advisers to private equity funds.

Read more...

B. Election Impact on the Oil and Gas Industry

Tectonic Shifts in Oil & Gas Flowing From the Election

By: Hunter S. Higgins, Pepperdine School of Law, Class of 2017

Introduction

At the time of this writing, less than one week following the surprising election results, President-elect Donald J. Trump has already made efforts to distinguish himself from President Obama's stance on the environment and the role of the oil and gas industry within it. Those working within the oil and gas industry - whether in its so-called upstream, midstream, or downstream segments trifurcated below - have reason to celebrate the benefits of the dramatic change in our branches of government, and presumably, the bench or judicial branch. This article will not forecast the energy policy of a Trump administration, but rather discuss several uniquely unstable areas ripe for foreseeable change. Of relevance to our Committee's readership, many of these shifts, for better or for worse, will almost certainly translate to significant opportunities for small and middle market enterprise in the oil and gas industry.

Read more...

Meetings Information

A. Recap of Programs from the Annual Meeting in Boston, September 2016

1. Accelerators and Incubators, Their Clients, and the Role of the Lawyer

Chair: Sara Stock

Panelists: Madelyn Shulman, Jason Stone, Sara Stock, Elizabeth Bleakley, Tim Hayden, Merritt Cole

Description: This panel discussed variations in accelerator and incubator ecosystems in various parts of the U.S. Additional topics covered included securities law issues related to representing early stage companies and how lawyers can cost-effectively represent them. Ethics in attorney compensation and investing in your client was also discussed.

Co-Sponsors: Private Equity and Venture Capital

Program Materials

2. Why Insurance Is Only Boring Until It Matters - Insurance Law for the Generalist (Corporate Counsel Triage Series)

Chair: George M. Flint, III

Panelists: May Lu, Mark Dykes, Christina Kokinda, James Rudder, Daniel Struck

Description: This panel discussed insurance basics for generalists, duties that arise in an insured-insurer relationship, the role of the broker in placing coverage...
and making claims, when you must read the insurance policy, how to negotiate insurance requirements in contracts, and recent developments changing the landscape including physical harm resulting from cyber perils.

Co-Sponsors: Corporate Counsel, Captive Insurance

Program Materials

3. Coming to America: What Your Foreign Clients Need to Know

Chair: David Jaffe and Hermann Knott

Panelists: Hermann Knott, Michael Bernasconi, Steven Huang, Jackie Liu, Donald Parsons, Takashi Toichi

Description: Foreign businesses expanding into the U.S. often encounter difficulties and make costly mistakes. This program explained legal issues and offered practical solutions to business and cultural challenges. The panel of U.S. and foreign attorneys provided take-aways that attendees could put to work as they help clients coming to America.

Co-Sponsors: Business & Corporate Litigation, Corporate Counsel

Program Materials

B. Recap of Programs from the Fall Meeting in Washington, D.C., November 2016

1. How to Develop an Effective Compliance Program to Address Evolving Federal Regulations

Chair: Gary Ross

Panelists: Michael Vargas, Steven Pearlman, Eric Hirschhorn, Brian Castro, Braddock Stevenson

Description: Panelists from federal regulators and the private bar addressed recent federal regulatory developments of particular interest to in-house and outside counsel who advise businesses in the technology, manufacturing, and financial services sectors.

Co-Sponsors: Corporate Compliance, Corporate Counsel

Program Materials

C. Subcommittee and Task Force Updates

1. Emerging Companies Subcommittee

The Emerging Company Subcommittee held its first program at the Boston meeting, which was very successful. The Subcommittee decided that it will plan to hold another program at the Annual Meeting in 2017. The Subcommittee discussed possible topics for that program, which included:

- Accelerators and Incubators
- The Emerging Company Ecosystem
- A Corporate Counsel Triage Series program focused on Dealing with Early Stage Companies
- Investing in Emerging Companies
- Corporate Housekeeping and Fixing Common Legal Errors
- Priorities for Start-Ups

If you are interested in getting more involved with the Subcommittee, please contact Co-Chairs Sara Stock or Elizabeth Bleakley.

Read more...
D. Overview of Spring Meeting to be held in New Orleans, April 2017

1. Thursday, April 6, 2017

(a) Business Entities Governance Subcommittee Meeting, 9:00 a.m. - 10:00 a.m.

(b) Program: Securities Law for the Non-Securities Lawyer, 10:30 a.m. - 12:00 p.m.

(c) Middle Market & Small Business Luncheon, 12:30 p.m. - 2:00 p.m.

(d) International Expansion & Cross Border Transactions, 2:00 p.m. - 3:00 p.m.

(e) Emerging Companies, 3:00 p.m. - 4:30 p.m.

(f) Private Placement Broker Task Force, 4:30 p.m. - 5:30 p.m.

2. Friday, April 7, 2017

(a) Family-Owned Businesses, 9:00 a.m. - 10:00 a.m.

(b) Short Form M&A Documents Task Force, 10:00 a.m. - 11:00 a.m.

(c) Program: Fiduciary Duties in Action: Advising Small to Mid-Sized Business Fiduciaries in Drafting, Decision-Making and Disputes, 10:30 a.m. - 12:30 p.m.

(d) Securities Regulation Joint Subcommittee Meeting, 2:00 p.m. - 3:00 p.m.

(e) Meeting of Subcommittee Chairs, Task Force Chairs, Vice Chairs and Advisory Committee Chairs, 3:30 p.m. - 4:30 p.m.

(f) Contractual Governance of Business Entities Joint Task Force Meeting, 4:30 p.m. - 5:30 p.m.

(g) Middle Market and Small Business Committee Meeting, 4:30 p.m. - 6:00 p.m.

Leadership List of Middle Market and Small Business Committee

The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Boston!

Read more...

Contact Information; Disclaimers

The MMSB Committee prepares and delivers the Business Visions Newsletter to its members and the public to enhance our members' understanding of, and access to, the MMSB Committee's abundant programs and activities. This is a free service that is continually under development. While we try to keep the information timely and accurate, we cannot make any guarantees. We will and do strive to rectify all errors brought to our attention, and we ask for your vigilance in bringing to our attention any inaccuracies. Readers of our Business Visions Newsletter should be aware that information available in our newsletter may not reflect official positions of the ABA, the Business Law Section, the MMSB Committee or its members, or any regulatory agency or authority. Additionally, the...
views expressed in any article in the Business Visions Newsletter may not necessarily be the views of any organization with which the author is affiliated. Neither the ABA nor the MMSB Committee is responsible for the content or accuracy of any articles or other submissions included in our newsletter.

The Business Visions Newsletter may contain links to information or websites created and maintained by other public and private organizations. Our newsletter also contains links that direct the reader to other websites, both ABA websites and third-party websites. By clicking on any links provided in the Business Visions Newsletter, you assume any risks associated with accessing a website controlled by a third party, and you further agree to hold the ABA and the MMSB Committee harmless from any damage you may suffer as a result of going on or surfing such third-party websites. Please be aware that the MMSB Committee does not control or guarantee the accuracy, relevance, timeliness, or completeness of any information provided by any source other than the MMSB Committee.

If anyone has any ideas concerning future editions of the MMSB Committee’s newsletter, or would like to get more involved with the Newsletter Subcommittee, please contact Evangelos “Andy” Kostoulas (at EKostoulas@nmlneil.com) or Mark D. Hobson (at markhobson@hobsonfirm.com), Co-Chairs of the Newsletter Subcommittee.

**Listserve Protocols**

a) **Listserv.** The MMSB Committee encourages all of its members (especially those who have recently joined) to become active participants in all committee activities, including participating in discussions on our Listserv. It is a great way to learn about current legal issues affecting your practice. The Listserv provided by the MMSB Committee ("MMSB Listserv") is a great medium with which to solicit the advice of your peers, benefit from their experience and participate in an ongoing conversation about relevant topics. To be able to send a message through the MMSB Listserv, however, you must first be a member of the MMSB Committee. All Listserv participants are also required to comply with the Rules & Etiquette Guidelines described below.

b) **Listserv Archive.** Members of the MMSB Committee who are fully signed up for the Listserv can access the extensive MMSB Listserv archive at the following link: Listserv Archive

c) **How to Manage Listserv Emails:** The following link provides instructions on how to set up a subfolder on your computer, so that all emails that you receive from the MMSB Committee Listserv automatically will be filed into that subfolder: Managing Listserve E-Mails

d) **Rules & Etiquette Guidelines for Use of the MMSB Listserv.**

The MMSB Committee has established Rules & Etiquette Guidelines that will govern all participants’ use of the MMSB Listserv. If a participant fails to adhere to these Rules & Etiquette Guidelines, the MMSB Committee may suspend or terminate that person's future participation on the MMSB Listserv.

The Rules & Etiquette Guidelines for use of the MMSB Listserv can be found here: MMSB Listserve Rules & Etiquette. If you have questions, contact Evangelos “Andy” Kostoulas at EKostoulas@nmlneil.com, Co-Chair of the Newsletter Subcommittee.

**Requests for Submissions/Sponsors**
Dear Middle Market and Small Business Committee Members:

Our Committee is always actively seeking sponsors and volunteers, and we need your continued help. Please continue reading below to learn how you can contribute to our Committee's success.

Having sponsors will provide a financial contribution to help fund Committee dinners. But perhaps more importantly, sponsors can provide a strategic relationship with our committee and provide substantive content and market intelligence during Committee meetings as well as participate in our CLE programs. Efforts to secure additional sponsors are being led by Michel Gélinas (mgelinas@stikeman.com). If you have any leads or suggestions, please let Michel know.

We want to continue to express profuse thanks to our current sponsor, Stout Risius Ross, Inc. Please be sure to thank its representatives in person when you see them at our meetings, lunches, and dinners. The last page of this newsletter contains more information about our current sponsor. Please check it out!

If you are interested in preparing a short, substantive article on a topic that is relevant for our Committee, please contact Evangelos "Andy" Kostoulas (at EKostoulas@nmnlei.com) or Mark D. Hobson (at markhobson@hobsonfirm.com), Co-Chairs of the Newsletter Subcommittee.

All articles for the newsletter should be minimal in length (up to 2,000 words). In addition to being circulated to our approximately 1,400 members, your article may also be eligible for publishing in the Business Law Section's Business Law Today, a monthly publication circulated to approximately 37,000 members.

Thanks to everyone for your support!

Thomas J. Walsh, Jr.
Chair, Middle Market and Small Business Committee
Business Law Section

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**Law Student Committee Associate Program**

**ABA Committee Associate Program**

The ABA's Committee Associate Program ("CAP") is designed to build relationships between law students and members of the ABA Business Law Section (the "Section"), by giving students the opportunity to gain experience through substantive and administrative projects with committees of the Section.

The MMSB Committee is continually seeking up to 3 associates to help write (i) articles and (ii) summaries of the various activities of the MMSB Committee's subcommittees and task forces for inclusion in our newsletter. Articles and summaries will be based on live programs from the MMSB Committee's Fall, Spring and Annual Meetings as well as other MMSB Committee meetings, webinars, and lunches that feature one or more speakers. CAP Associate(s) will work with the program presenters and speakers to write certain articles, and also have the opportunity to work with program presenters and speakers to help draft and eventually possibly submit article(s) for publication in the ABA's Business Law Today. Published articles will be drafted primarily by the program presenter or speaker. Attending meetings is required and since travel is not reimbursable, the MMSB Committee is seeking primarily law students who are local to each of the next Fall, Spring and Annual Meetings. The date and location of upcoming meetings are:

- Spring Meeting 2017 - April 6-8, 2017 - New Orleans, LA
- Annual Meeting 2017 - September 14-16, 2017 - Chicago, IL
Fall Meeting 2017 - November 16-18, 2017 - Washington, D.C.

The duration of the position is for at least the applicable meeting and completion of article(s) arising from the same meeting that the CAP Associate(s) attended.

Law students may apply by visiting the CAP website for an application.

If you are interested in participating in the CAP and helping the MMSB Committee, please contact Evangelos “Andy” Kostoulas at EKostoulas@nmlneil.com.

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Nick Jachim, Investment Banking Group Head
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Our Mission

The mission of the Middle Market and Small Business Committee (“MMSB Committee”) is to serve, educate, and bring together corporate, transactional, and securities lawyers—in an effort to improve the legal profession—who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies. To achieve this objective:

- The MMSB Committee provides a forum for its members to share information, to deliver and receive continuing legal education, to address current and practical legal issues affecting smaller and mid-sized businesses, and to learn best practices concerning relevant areas of law, legal ethics, and technology applicable to the delivery of legal services in the 21st Century.

- The MMSB Committee zealously advocates before various regulatory agencies, and has been doing so for decades. Such advocacy concerns current issues and laws that relate to specific problems and needs of small businesses, including smaller public companies. Agencies before which the MMSB Committee and its members regularly advocate include, among others, the Securities and Exchange Commission (“SEC”), the Internal Revenue Service, the Financial Industry Regulatory Authority (“FINRA”), and the National Association of Securities Dealers. For example, our Private Placement Broker Task Force and some of its individual members lobby the SEC, FINRA, and other regulatory agencies to implement a simplified registration system for finders of financing for early-stage companies.

- The MMSB Committee brings scrutiny and discourse to the entire business “life cycle” of our member’s clients with expert panels focused on highly relevant topics such as:
  
  (i) entity organization and owner agreements  
  (ii) capital formation, financing, and strategic partnering  
  (iii) employment and compensation matters  
  (iv) intellectual property and trade secrets protection  
  (v) corporate governance  
  (vi) securities law compliance  
  (vii) international expansion and cross-border transactions  
  (viii) business combinations, restructuring, and breakups

In this issue, the Business Visions Newsletter continues its ongoing series on start-up activity around the globe, and features a special section addressing the new President and the impact his administration may have on the legal landscape. The MMSB Committee is grateful to its members for their contributions. We hope you will read and enjoy these articles.
Committee Facts

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,400 members, both in the United States and abroad.

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  - the Spring Meeting, to be held from April 6-8 in New Orleans,
  - the Annual Meeting, to be held from September 14-16 in Chicago, and
  - the Fall Meeting, to be held from November 16-18 in Washington, D.C.

- Meetings of the MMSB Committee typically feature a mini-presentation on a substantive practice area and provide an opportunity to share practical advice relevant for smaller and medium-sized companies as well as the lawyers who counsel them.

- An area in which a great deal of the MMSB Committee’s efforts are directed involves the federal and state securities regulations that affect smaller public companies and capital-raising activities of private companies, including qualifications for exemptions from registration, qualifications for exemptions from registration for private placement brokers, and implementation of scaled disclosure regulations to help smaller and medium-sized businesses be able to raise legally the capital they need to expand their operations and without the need to comply with unnecessary, burdensome, and expensive regulatory requirements.

- Membership in the MMSB Committee provides numerous opportunities to participate in CLE panels and workshops, writing opportunities, and opportunities to comment on regulations proposed by the SEC and other regulatory agencies. Participation is strongly encouraged and the MMSB Committee welcomes all levels of experience. Come learn why the Middle Market and Small Business Committee is called The Best Damn Committee in the whole ABA! Please see the Leadership List in Section VI for people you can contact to get more involved.
Innovation in Chattanooga, Tennessee

By: April Holland, Associate, Miller & Martin, PLLC

Chattanooga, Tennessee, the Scenic City, made national headlines in 2012 when the Electric Power Board (EPB), a publicly-owned electric utility serving Chattanooga, achieved the lofty goal of providing city-wide access to the fastest internet in the country. EPB’s installation of a fiber optic network made available one gigabit per second internet speed to every residence and business in the city, making it the first city in the Western hemisphere to complete such a feat. In 2015, EPB clocked it up to 10 gigabits per second, the first internet service provider in the world to do so.

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- The Edney Innovation Center (http://theadney.com) acts as a hub for the startup community in the heart of the Innovation District, offering co-work space, event/community space, and office space for lease.
- CO.LAB (http://colab.is) is a nonprofit startup accelerator that offers programs such as GigTank 365, Co.Starters, and Co.Lab Accelerator which address different stages of the startup lifecycle.
- Dynamo Accelerator (http://hellodynamo.com) is a 12-week accelerator focused on transportation and logistics startups.
- Tech Town (http://gotechtown.org) is a technology and entrepreneurial-focused educational center that offers classes and camps on coding, 3D design, robotics, and film to kids of all ages and backgrounds.
- Causeway (http://causeway.org) leverages social entrepreneurship to help address the city’s toughest challenges. It empowers any individual with a great idea for social change within the community to execute it by providing tools, funding, support, and guidance.
- Startup Week Chattanooga (http://startupweekcha.com) is a full week in October each year of free events around the city for startups and entrepreneurs.
- INCubator (http://www.chattanoogachamber.com/incubator) is a business incubator run by the Chattanooga Area Chamber of Commerce which offers resources including shared administrative services and below-market rent to startups in a three-year, staged development program.

While many cities are jumping on the startup/entrepreneurial bandwagon, Chattanooga is differentiating itself by attracting B2B/enterprise, big data, 3D printing, and transportation logistics startups to the area. The legal community addressing startups is as welcoming as it is knowledgeable.
The feel-good collaborative environment is infectious and you will find some of the happiest lawyers in the country in the place Outdoor Magazine called the “Best Town Ever”.
Regulating FinTech

By: Joseph E. Silvia, Counsel, Schiff Hardin

Over the last few years, financial technology, commonly referred to as “FinTech,” has been used to describe a multitude of firms, activities and capabilities for financial services. Some have posited that the firms representing FinTech are unregulated and in need of significant limitations akin to those restricting traditional providers of financial services. In fact, they are regulated and have a number of state and federal restrictions to which they are subject, depending on their activities.

In this article, my goal is to identify three of the biggest legal and regulatory challenges that FinTech firms encounter in financial services. The first challenge is the overall regulatory landscape for consumer financial services providers – a challenge in and of itself. The second one, and in many ways the one most connected to the consumer financial services landscape, is handling third-party relationships and vendor management. Finally, our third key challenge for many FinTech firms is compliance with the Bank Secrecy Act and anti-money laundering rules.

Challenge #1: The Consumer Financial Services Landscape

Whenever an institution is dealing with a consumer, directly or indirectly, there are increased risks, sensitivities, and unknowns to consider. Moreover, these considerations have been brought to the fore in the wake of the financial crisis in 2008 and the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”). The Dodd-Frank Act created, among other things, a new federal agency with a strict consumer protection mandate, the Consumer Financial Protection Bureau (“CFPB”). Since its establishment, the CFPB has been relentless in its mission of enforcing the consumer financial services laws of the United States in a new and meaningful way. So, why is the consumer financial services landscape so important to FinTech firms?

First, the CFPB has made it clear that any person that provides financial services to a consumer, directly or indirectly, will be subject to its jurisdiction. In addition, as the CFPB and other regulators in the banking context have made clear, the service providers to financial services firms may be subject to the jurisdiction of the CFPB. This broad scope of jurisdiction means that FinTech providers must pay attention to what the CFPB is saying and doing. For example, the CFPB has recently issued proposed rules that focus on the small-dollar lending market, an area of the lending market where FinTech has expanded its focus.

Secondly, the consumer financial services landscape is important to FinTech firms because, unlike many other areas of banking and financial institution law, the consumer financial services laws apply based on the products or services being offered, not on the kind of institution providing such products or services. What this means is that the activities are the key to determining what laws apply in consumer financial services. For example, a disruptive online lending platform providing loans directly to consumers will still have obligations to comply with very traditional lending laws, such as the Truth in Lending Act, anti-discrimination laws, and unfair and deceptive acts or practices statutes, as well as a multitude of state-specific licensing or registration requirements.

Challenge #2: Third-Party Relationships and Vendor Risk Management

Third-party relationships have taken a front-row seat lately with banking regulators and the CFPB especially. Each of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the
Comptroller of the Currency (the “OCC”), as well as the CFPB, has released new or updated guidance in some form over the last few years—some of which predates the Dodd-Frank Act—related to third-party relationships and vendor risk management. Perhaps most comprehensive is the OCC’s 2013 Risk Management Guidance on Third-Party Relationships.

In its guidance, the OCC not only describes best practices for risk management, but the OCC identifies relevant modifications that may be necessary to the contractual relationship between the bank and its vendor. Such contractual modifications have been resisted by many vendors due to the potentially onerous nature of certain suggested provisions, such as provisions regarding compliance, internal controls, and regular audits of the vendor. However, the regulatory community views the significant third-party relationships as an outgrowth of the actual provider of financial services, such as the bank or mortgage company, and, therefore, views the risks to consumers, and potentially the institution itself, as significant. To put it another way, this is where the rubber meets the road for FinTech firms partnering with banks and other financial services providers.

Going forward, FinTech firms have been, and will continue to be, subject to potentially onerous requirements in order to engage in a meaningful way with traditional providers of financial services to consumers. It is critical that FinTech firms and their counsel understand the contractual expectations that bank and non-bank regulators have to define the contours, limitations, and compliance related to these partnerships.

Challenge #3: Bank Secrecy Act and Anti-Money Laundering Compliance

The third challenge for FinTech firms is just as significant as the first two. Compliance with the Bank Secrecy Act and anti-money laundering (together referred to as “BSA/AML”) laws and regulations is significant because of the risks of getting it wrong. Such risks include not only significant financial risks, but also significant reputational risks. Further, these risks may be heightened for firms operating largely in an electronic environment, such as FinTech, where some customers are actively using digital currency or other methods of transacting business electronically in a way that provides some or potentially complete anonymity and an increased velocity of transactions.

In addition to current challenges of BSA/AML compliance in transacting business electronically, FinTech firms will find that the obligations on BSA/AML compliance will only increase in the future. For example, there are already new obligations to understand the true beneficial owners and control persons of certain customers, which banks and other financial institutions are facing as full implementation of those new rules is less than two years away now. Moreover, state and federal regulatory agencies appear to be reviewing BSA/AML compliance for broader sets of activities and exposures when examining their regulated entities as well as those entities’ vendors. There are even efforts underway to consider the imposition of personal liability for compliance failures in BSA/AML compliance.

Conclusion

As we can see from this brief synopsis of just three challenging areas of the law that face FinTech firms operating in the financial services industry, the thought that FinTech firms are somehow unregulated market participants is simply not true. It may be that certain of these firms are less regulated than others, but that is more a function of the specific activities being conducted. In addition to those areas of law discussed above, FinTech firms need to be aware of the evolving landscape of laws affecting data security, privacy, cybersecurity, payments systems, and electronic transactions. Each of these areas will subject
FinTech firms to a broader range of regulation and compliance obligations in the near future, so stay tuned!
Election Impact on Exempt Offerings and Private Fund Advisers

By: Mark Hobson, Principal, Hobson Firm

The results of the 2016 U.S. Presidential election have left many people wondering about the impact that President-elect Trump (and the Republican-controlled Congress) will have on the U.S. capital markets. What regulatory changes should start-ups and other smaller issuers, as well as advisers to private equity funds, expect to see in the foreseeable future, now that the election is over?

It is widely anticipated that the Trump administration will have a deregulatory focus, as evidenced in part by the selection of Paul Atkins, a conservative former Securities and Exchange Commission (the “SEC”) commissioner, to head the President-elect’s transition team for the SEC and other independent financial regulatory agencies. During his campaign, candidate Trump also stated that he would dismantle or substantially revamp the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), which when enacted affected just about every part of the U.S. financial services industry, including the offer and sale of securities exempt from registration under the Securities Act of 1933, as amended (the “Securities Act”), and the regulation of advisers to private equity funds.

While change is as certain as death and taxes, the SEC has a staff of about 4,000, and any change in the five-person commission that runs the agency should not have an immediate effect on the current SEC policies governing the offer and sale of securities exempt from registration under Section 5 of the Securities Act (“exempt offerings”). It took the SEC a few years, for example, to implement some of the changes mandated by the Dodd-Frank Act and the 2012 Jumpstart Our Business Startups Act (the “JOBS Act”), such as rules to adopt a crowdfunding exemption.

Another reason not to expect too much immediate change is that significant revisions to the regulatory framework governing exempt offerings have already been made in the last several years; changes that have made it easier for smaller issuers to raise funds and bring in investors. For example, starting in September 2013, an issuer is now allowed to engage in general solicitation and general advertising in connection with the offer and sale of its securities and still qualify for an exemption from registration under the Securities Act, so long as that issuer complies with the safe harbor provided by Rule 506(c) of Regulation D. It seems unlikely that the Trump administration will make any sweeping changes to the existing regulatory framework governing exempt offering because an issuer today has more options available to conduct an exempt offering than ever before. What are these options and how have they evolved in recent years?

Regulation D, promulgated in 1982 under the Securities Act, initially provided an issuer with three safe harbors—a Rule 504 offering, a Rule 505 offering and a Rule 506 offering—under any of which an issuer could conduct its securities offering and be sure to qualify for an exemption from the registration requirements imposed by Section 5 of the Securities Act. Although Regulation D established three separate safe harbors, Rule 506 has proven to be the preferred choice of issuers conducting exempt offerings within the United States. Prior to the passage of the Dodd-Frank Act, most issuers engaging in smaller capital raises (say, $50 million or less) would conduct their offering pursuant to the safe harbor provided by Rule 506 of Regulation D to ensure that their offering was exempt from federal registration

1 A longer version of this article was published in the Daily Business Review (an ALM Publication) on December 21, 2016, and is being republished here with the permission of ALM. Special thanks to Bonnie Roe, Greg Yadley, and Tom Walsh for their input on the article.
under Section 5 of the Securities Act. To qualify for the Rule 506 exemption, the issuer had to satisfy certain standards, including:

1) The issuer could not use general solicitation or advertising to market its securities;

2) The issuer could sell its securities to an unlimited number of “accredited investors” and up to 35 other purchasers who, either alone or with an advisor, were sophisticated and therefore had sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment;

3) The issuer had to give all non-accredited, but sophisticated investors disclosure documents similar to those used in registered offerings (including audited financial statements). The issuer could decide what information to give to accredited investors, so long as it did not violate the antifraud prohibitions of the federal securities laws, and any information provided to accredited investors had to be made available to non-accredited investors as well;

4) Representatives of the issuer had to be available to answer questions by prospective purchasers; and

5) Issuers had to file what is known as a “Form D” electronically with the SEC no later than 15 calendar days after the “date of first sale” of the securities in the offering.

Under the old regulatory system, anyone could be involved in the exempt offering, including felons and other “bad actors,” so long as the issuer complied with the antifraud rules imposed by federal and state securities laws, which make it illegal for any person to make any misleading statements or omissions in connection with the offer and sale of securities. To comply with the antifraud rules, an issuer must provide each investor with full and fair disclosure of all material facts regarding the issuer and its activities. Facts are material if an ordinary investor would consider them important when making an investment decision. Thus, although anyone could be involved in the offer and sale of securities under the old regulatory system, the well-advised issuer fully disclosed all material facts to prospective investors, including material information about its founders, such as any felony convictions.

In addition to making sure it satisfied a federal exemption, the issuer wanting to conduct an exempt offering also had to be sure that its offer and sale satisfied any applicable state securities laws (commonly known as “blue-sky laws”) because the United States has had a dual system of securities regulation (federal and state regulation) since the end of the Great Depression. In October 1996, Congress simplified the old regulatory system for exempt offerings by enacting into law the “National Securities Market Improvement Act of 1996” (“NSMIA”), which among other things preempted state law on any offering of a “covered security” (as defined in NSMIA). Securities offered and sold in a Rule 506 offering were included in the term “covered security” and therefore exempt from state registration and review. Under NSMIA, states were limited to requiring issuers to submit “notice filings” and consents to service, and to pay certain fees. Therefore, following the passage of NSMIA, an issuer conducting a Rule 506 offering had a much easier time satisfying the requirements of the U.S. dual system of securities regulation.

Advisers to private equity funds also benefited from the adoption of NSMIA. Under the old regulatory system, an adviser to one or more private equity funds generally could avoid federal registration under the Investment Advisers Act of 1940 (the “Advisers Act”) if it had fewer than 15 clients
during the prior 12-month period unless, among other things, it held itself out to the public in the United States as providing investment advice. For purposes of the federal de minimis exemption, a private equity fund was treated as one client, regardless of the number of members or limited partners that that fund had. NSMIA extended the federal de minimis exemption to the states.

NSMIA also included a section titled the “Investment Advisers Supervision Coordination Act” (the “Coordination Act”) that took effect on July 8, 1997. The Coordination Act significantly impacted state regulation of investment advisers by creating a two-tier system for the registration of investment advisers in the United States and reallocated responsibility for registering investment advisers between the states and the SEC. Investment advisers with less than 25 million dollars of assets under management (“AUM”) were required to register with the states and those with 25 million dollars or more of AUM were required to register with the SEC. The SEC also issued a companion release in 1997 to implement amendments to the Advisers Act mandated by NSMIA (Investment Advisers Act Release No. 1633) that, among other things, clarified how advisers should count clients for purposes of the de minimis exemption on both a state and federal level.

In very simplistic terms, under the old regulatory system in place prior to 2010, smaller issuers largely conducted their exempt offerings under Rule 506 and advisers to private equity funds generally relied on the federal de minimis exemption to avoid federal and state registration. The old regulatory system began undergoing fundamental changes in 2010, with the passage of the Dodd-Frank Act and the JOBS Act. Since 2010, the following changes have occurred:

- In October 2011, the SEC and the Commodities Futures Trading Commission issued joint final rules to implement provisions of the Dodd-Frank Act. These joint rules substantially revised the two-tier system for the registration of investment advisers in the United States, eliminated the federal de minimis exemption, and required more advisers to private equity funds to file reports under the Advisers Act.
- In December 2011, the SEC amended the standards for determining if a person is an “accredited investor” as required by the Dodd-Frank Act to exclude the value of a person’s primary residence for purposes of determining whether the person has a net worth in excess of $1 million.
- In July 2013, the SEC issued final rules as required by the JOBS Act to eliminate the prohibition against general solicitation and general advertising, and established new Rule 506(c) offerings.
- In July 2013, the SEC issued final rules as required by the Dodd-Frank Act to disqualify “bad actors” from being involved in Rule 506 offerings.
- In March 2015, the SEC issued final rules to update and expand Regulation A, as mandated by the JOBS Act, to enable smaller issuers to offer and sell up to $50 million of securities “to the public” in a 12-month period, subject to eligibility, disclosure, and reporting requirements.
- In October 2015, the SEC issued final rules as required by the JOBS Act to permit individuals to invest in securities-based crowdfunding transactions subject to certain investment limits and disclosure requirements. The final rules also created a regulatory framework for the broker-dealers and funding portals that facilitate the crowdfunding transactions.
- In October 2016, the SEC issued final rules to (1) modernize and amend Rule 147, (2) establish a new intrastate offering exemption under the Securities Act, designated Rule 147A, (3) amend Rule 504 to increase the aggregate amount of securities that may be offered and sold in any twelve-month period to $5 million, (4) disqualify certain bad actors from participation in Rule 504 offerings, and (5) repeal Rule 505. Amended Rule 147 and new Rule 147A become effective on April 20, 2017, amended Rule 504 becomes effective January 20, 2017, and the repeal of Rule
In conclusion, it seems unlikely that the Trump administration will roll back the relatively recent changes affecting exempt offerings because those changes have had a deregulatory effect and provide smaller issuers with more options to raise capital than ever before. The changes affecting advisers to private equity funds, however, have resulted in more regulation, rather than less, and therefore may face the scrutiny of the Trump administration and the Republican-controlled Congress. In any event, issuers and advisers need to make sure they understand and comply with the new regulatory framework (and any future changes thereto). If an issuer or adviser is found to have violated federal and state securities laws, pleading ignorance of the law will be no excuse. Seeking legal advice from knowledgeable counsel to understand the dangers, as well as the opportunities, of the new laws and regulations is a more prudent course of action.
Tectonic Shifts in Oil & Gas Flowing From the Election

By: Hunter S. Higgins, Pepperdine School of Law, Class of 2017

Introduction

At the time of this writing, less than one week following the surprising election results, President-elect Donald J. Trump has already made efforts to distinguish himself from President Obama’s stance on the environment and the role of the oil and gas industry within it. Those working within the oil and gas industry – whether in its so-called upstream, midstream, or downstream segments trifurcated below – have reason to celebrate the benefits of the dramatic change in our branches of government, and presumably, the bench or judicial branch. This article will not forecast the energy policy of a Trump administration, but rather discuss several uniquely unstable areas ripe for foreseeable change. Of relevance to our Committee’s readership, many of these shifts, for better or for worse, will almost certainly translate to significant opportunities for small and middle market enterprise in the oil and gas industry.

Upstream

On December 18, 2015, Congress passed H.R. 2029 and in so doing, upheaved the domestic oil and gas status quo. The legal effect was a repeal of Section 103 of the longstanding Energy Policy and Conservation Act of 1975 (“EPCA”), which restricts the ability of the United States to export crude oil or natural gas produced in the United States; the practical effect of this repeal was the lifting of a more than four-decade ban on our country’s ability to compete in the global oil marketplace.

The timing of the repeal, coming off the wake of the so-called fracking revolution (or anti-fracking revolution, depending on one’s perspective), couldn’t be more favorable to oil and gas insiders. To those not paying attention, the United States has quietly become the world’s largest producer of oil and natural gas and second-largest producer of liquefied natural gas, increasing its output of crude oil to more than 3.6 billion barrels annually. For scale, the United States exported a paltry 43.8 million barrels in all of 2013, an amount now produced in just five days. This growth has not been lost on small and midsize businesses. A recent study conducted by the Small Business & Entrepreneurship Council noted the stark contrast in middle market and small business job growth in oil and gas made possible by hydraulic fracturing, finding that small and midsize firms – defined as 500 workers or fewer – to represent nearly 91.8%-98.7% of the market share. It further anticipated the growing global demand for natural gas would result in strong and sustainable growth for small and midsize businesses.

Section 103 of the EPCA was outdated in a 21st century America where more than 90% of new wells drilled on federal lands are done via hydraulic fracturing and OPEC negotiations are strained. Its repeal, however, does not simply mark a reversal in domestic energy policy in the abstract. Moving forward, the newly codified language expressly prohibits the Federal Government from imposing or enforcing any restriction on the export of crude oil. To that end, the future shaping of American participation in global crude oil exportation will now be tested under the statutorily bound hands of a President Trump. Nevertheless, the benefits of returning to the global bargaining table will no doubt expand upstream operations and present a stream of pay dirt for middle market companies and small businesses.

Midstream
President-elect Trump has already indicated support for the completion of the Keystone XL pipeline by inviting a reapplication from TransCanada Corp. In doing so, he has demonstrated an interest in the expansion of midstream transportation infrastructure on a transnational scale; it seems entirely plausible that this support will similarly extend to domestic projects like the Dakota Access pipeline and others.

Perhaps more ambitiously, it now appears entirely likely that Mr. Trump will withdraw the Obama administration’s Clean Power Plan, an attempt to establish the first carbon pollution standard that would apply to existing power plants. It is well established in the most recent annual U.S. Energy Information Administration outlook that the Clean Power Plan would have spelled out the demise of coal-generated energy. While the immediate implications to middle market companies and small businesses are detailed more significantly in that report, it is worth noting a recent shift in economics, that has, for the first time, held that natural gas can be produced more cheaply than coal. To that end, the report’s projected outlook of a carbon-less world vis-à-vis the Clean Power Plan may come about through free market forces.

Even without Mr. Trump’s intervention, the existence of the Clean Power Plan was already teetering at the hands of an ideologically divided Supreme Court. The decision in *W. Virginia v. EPA*, 136 S. Ct. 1000, 194 L. Ed. 2d 17 (2016), marked the first time the Supreme Court had stayed a regulation before a lower appellate court judgment. Notwithstanding the NY Times’ criticism of the Court’s decision as partisan jurisprudence, the likelihood of a President Trump appointed ideologically conservative Justice appears to portend the defeat of the Clean Power Plan. Frankly, this outcome may have occurred irrespective of the new appointee, as recent oral arguments heard on the D.C. Circuit this past September raised troubling questions as to its constitutionality. Should the Court have had a need to rely on stare decisis, it could have rejected the Clean Power Plan under the established precedent that prohibits the EPA from making decisions of vast “economic and political significance.” (*See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014)). Nevertheless, should the Clean Power Plan return to the Supreme Court in front of a new Justice, the argument will likely turn on whether Plan, as a whole, unconstitutionally commandeers and coerces states into carrying out federal energy policy. With a 5-4 ideological divide, it will likely be dead in the water.

**Downstream**

Speaking of water, a similarly postured debate encircles the status of the Clean Water Act and its questionable constitutionality. Two recent unanimous Supreme Court decisions – *United States Army Corps of Engineers v. Hawkes Co.* (2016) and *Sackett v. EPA* (2012) – have indicated a strong judicial tendency to restrict EPA expansion. While both cases dealt primarily with issues of executive agency deference, the rulings have peripherally criticized the EPA’s abuse of power via the Clean Water Act. The Court appears particularly interested in limiting the EPA’s jurisdiction over “wetlands,” which over the last few decades has been unilaterally broadened from “navigable waters” to all “Waters of the United States.” This prompted Justice Kennedy to assert that “the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice.” Concurring opinions in *Hawkes* seem only to further indicate disdain for the Clean Water Act, as Justices Alito, Thomas, and Kennedy state “the [Clean Water] Act . . . continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Hawkes* and *Sackett* demonstrate the Court’s attempt to limit its application, and the Clean Water Act’s constitutionality may yet be challenged.
Outside of the courtroom, these decisions present wins for middle market companies and small businesses in the oil and gas industry, as the EPA’s ad hoc federal claim to private property will likely be reined in. Irrespective of climate and environmental concerns, it is well established that the EPA and Clean Water Act serve as adversarial obstacles to the oil and gas industry. Their limitation and potential repeal may prove prosperous to practitioners.

Conclusion

Whether involved in traditional midstream oilfield services (e.g., storage, transportation, drill manufacturing) or cutting-edge entrepreneurial pursuits (e.g. data analysis, technology), the adage of a “rising tide floats all boats” rings true in the oil landscape. Political preferences aside, small and midsize businesses are primed to capitalize on the future landscape of oil and gas. From the commodity’s relatively low price to the aforementioned variety of unsettled litigation and stalled regulatory framework hanging in the balance, opportunities abound for risk-seeking entrepreneurs. And while there exist a variety of quasi-federal agencies like the EPA established to monitor and regulate oil and gas activity, the changing governmental landscape in 2016 has presented a highly politicized, and, for the moment, optimistic outlook for profiteering in oil and gas.
Subcommittee and Task Force Updates

1. Emerging Companies Subcommittee

The Emerging Company Subcommittee held its first program at the Boston meeting, which was very successful. The Subcommittee decided that it will plan to hold another program at the Annual Meeting in 2017. The Subcommittee discussed possible topics for that program, which included:

- Accelerators and Incubators
- The Emerging Company Ecosystem
- A Corporate Counsel Triage Series program focused on Dealing with Early Stage Companies
- Investing in Emerging Companies
- Corporate Housekeeping and Fixing Common Legal Errors
- Priorities for Start-Ups

If you are interested in getting more involved with the Subcommittee, please contact Co-Chairs Sara Stock or Elizabeth Bleakley.

2. Family-Owned Business Subcommittee

At the Annual Meeting, the Subcommittee discussed the latest developments in the ongoing fight for control over Viacom Inc. and 93-year old Sumner Redstone’s controlling stake in the company. As of mid-2016, there were lawsuits pending in Massachusetts, Delaware, and California. All of these suits in one way or another addressed Sumner Redstone’s competency to make decisions on his own behalf concerning his majority ownership stake in the company. Among the decisions being challenged was Redstone’s removal of long-time Viacom CEO Philippe Dauman as a trustee of the trust that held Redstone’s shares in the company. Dauman claimed that Redstone’s daughter, Shari, was unduly influencing Redstone and had orchestrated Dauman’s removal as part of a power struggle to take control of the company’s management. Shari maintained that Redstone had made the decisions on his own and was competent to make them. After removing Dauman and another long-standing board member as trustees, Redstone appointed new trustees who were allegedly closely aligned with Shari. Those trustees then caused the trust to submit a written shareholder consent to the company purporting to remove Dauman and others as directors of Viacom and amending Viacom’s by-laws. Even though Redstone lived in California and Viacom was organized in Delaware, the primary case was litigated in a probate court in the suburbs of Boston, Massachusetts, since the trust documents were governed by Massachusetts law. At one hearing, 43 lawyers appeared on behalf of the various parties. In mid-August, the probate court judge set a mid-September trial date, with the trial to be focused on Shari’s alleged actions in influencing Redstone in the administration of the trust. With the trial date looming, the parties reached a settlement through which Dauman agreed to step down as CEO of Viacom. Dauman reportedly was to receive a $72 million payout upon his departure. New directors were also elected to the Viacom board as part of an expected transition by certain other board members. Both the trust and Viacom had been in existence for decades, and had sophisticated and comprehensive governance provisions in place. Nonetheless, the recent maneuverings by the various interested parties in this situation highlight how disputes, often based on power struggles or personal conflicts, can arise even in the face of the best-drafted documents. These
disputes are usually costly, distracting, and, as in the case of Viacom, are accompanied by much publicity, as the drama around the various legal battles appeared in media headlines for over a year.

At the Fall Meeting, the Subcommittee discussed the situation unfolding at Louis Dreyfus Commodities, as reported in recent business press articles. The company is one of the world’s largest commodity traders. It dates back to the 1850s and has been family-controlled for its entire history. By the mid-2000s, ownership had concentrated in one of the founder’s descendants, Robert Louis-Dreyfus, after other family members had sold their shares in the company over the years. Robert died in 2009. Before that, he had established a trust to hold his shares and had named his wife, Margarita Louis-Dreyfus, as a protector of the family foundation that controlled the trust. According to press reports, neither Robert nor the other family member shareholders ever expected Margarita to become actively involved in the company. After Robert’s death, however, Margarita became chairman of the company and began to hire and then replace a succession of top level management. Some of the remaining family member shareholders became dissatisfied with Margarita’s activities and tendered their shares to the trust for purchase. In creating the trust, Robert had added a provision obligating the trust to purchase any shares tendered by other family members in order to ensure that the company would continue to be family-controlled. A dispute arose between the trust and the tendering family members, which, as of November, was still being litigated in a court in the Netherlands. In order to finance the purchase of previously tendered shares, the trust had taken on hundreds of millions of dollars in debt, secured by the trust’s shares. In order to finance the present buyout, Margarita apparently was speaking to non-family investors, including sovereign wealth funds, about taking a minority stake in the company. With this backdrop, the group discussed various planning devices for transfer of family business ownership and control; the pros and cons of mandatory buyout provisions; issues that arise with unexpected management changes; debt financing secured by shares in a family business; and the challenges involved in bringing non-family investors and shareholders into the company.

3. International Expansion and Cross-Border Transactions Subcommittee

The International Expansion and Cross-Border Transactions Subcommittee meeting was held on Thursday, September 8. Two different presentations were made at the meeting:

1. "Key Considerations for Foreign Manufacturers That Wish To Sell/Distribute Products In The United States", presented by Jeff White (Hartford and New York City) from Robinson Cole.

2. "Brexit - Implications for M&A in Europe: An Overview for US Dealmakers", presented by John Hammond (Stuttgart), Joerg Lips (Berlin) and Alexandra Rohmert (Paris) all from CMS.

Topics for Subcommittee Meetings: If you have ideas or suggestions for a topic to be discussed at our next Subcommittee meetings (or would like to do a short 15-30 minutes presentation) in New Orleans (April 2017) or Chicago (September 2017), feel free to contact any of the Co-chairs: david@jaffecounsel.com, hermann.j.knott@luther-lawfirm.com, or mgelinas@stikeman.com.

About the Subcommittee: The International Expansion and Cross-Border Transactions Subcommittee has members from the U.S. as well as from 14 other countries. If you would like to join the Subcommittee, please send an e-mail with your contact information to Michel Gélinas at mgelinas@stikeman.com.
4. Private Placement Broker Task Force

The Task Force discussed the effect of a changing political and regulatory environment on the efforts of the Task Force to reduce regulatory burdens on finders.

The Chair noted that FINRA’s new CEO has commented that FINRA’s CAB rule may not have gone far enough. She also stated that SIFMA membership and therefore SIFMA did not support Congressional bills to codify the M&A Brokers No Action Letter because the EBIDTA limit embodied in the proposed legislation was set at $25 million and SIFMA members were unwilling to accept a cap over $10 million.

Members summarized certain recommendations made on Nov. 17 at the SEC-Government Business Forum on Small Business Capital Formation, including a preemption of all state regulation of Tier 2 Reg A and registered offerings, creating a new tier of more lightly regulated brokers who act in a finders capacity, and more broadly, recommending that the SEC work with FINRA and NASAA to implement the recommendations of the Private Placement Brokers Task Force.

Task Force members discussed ongoing difficulties with fund sales with respect the selling compensation prohibition in the Rule 3(a)(1) safe harbor as well as the issues with compensation for portfolio transactions illustrated by the Blackstreet case. The Task Force recommended that we get feedback from the Small Business Issuers Subcommittee and the Private Equity Venture Capital Subcommittee as to these areas of mutual concern. It was recommended that we explore the possibility of a tier of broker-dealer light dual registration for federally registered investment advisers. The members also discussed the relabeling of fees that some advisors have undertaken post Blackstreet, as well as increased broker-dealer registration.

Martin Hewitt reported on the lack of adoption of NASAA’s M&A Broker model rule (or a form thereof) by all states save Florida and Utah.

The Task Force agreed to focus on advocating for a rule that would provide that registered brokers may pay finders for bringing them transactions with the proviso that the broker would bear responsibility for the actions of the finder in a manner similar to the chaperoning provisions of Rule 15a-6.

It was noted that new SEC Rule 4(a)(7) codified the so-called Rule 4a(1 1/2) relief from registration as a statutory underwriter under Section 2(a)(11) of the Securities Act for sales between sophisticated purchasers by defining the subject securities as covered securities under Section 18(b).

It was also agreed that the Task Force reach out to the Venture Capital Association and SIFMA to identify areas where we might collaborate.

5. Short Form M&A Documents Task Force

The Task Force continued its work on the Model Short Form Stock Purchase Agreement, which is intended for deals in the $500,000 to $3,000,000 range. The agreement and optional provisions have been completed and are about 15 pages long in total. Most of the discussion at the meeting focused on finalizing the commentary for the agreement.
LEADERSHIP LIST OF MMSB COMMITTEE

The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Boston!

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(SC = Subcommittee Chair; SCC = Subcommittee Co-Chair; SVC = Subcommittee Vice-Chair; TFC = Task
Force Chair; TFVC = Task Force Vice-Chair).