December 14, 2015

President Signs the FAST Act: Transportation Legislation Contains Several Securities Law Provisions, including Modifications to the JOBS Act

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation (FAST) Act. The transportation measure includes several securities law-related provisions that (1) facilitate capital-raising transactions for emerging growth companies (EGCs), (2) modernize disclosure requirements for public companies, (3) codify the so-called "Section 4(a)(1½) exemption" for private resales of restricted securities, and (4) simplify the registration process for smaller reporting companies. Below are brief summaries of the key securities law-related provisions included in the FAST Act.

Modifications to the JOBS Act

Title LXXI – Improving Access to Capital for Emerging Growth Companies of the FAST Act:

- reduces the 21-day period to a 15-day period during which an EGC must have publicly filed its confidential registration statement with the Securities and Exchange Commission (SEC) prior to commencing its road show;
- provides a grace period for an issuer that was an EGC at the time it submitted its confidential registration statement to the SEC but ceases to be an EGC prior to the completion of the offering to continue to be treated as an EGC through the earlier of the date on which the issuer consummates its initial public offering (IPO) or the expiration of a one-year period beginning on the date that the issuer ceased to qualify as an EGC; and
- permits EGCs that file a Form S-1 or Form F-1 registration statement (or submit the statement for confidential review) to omit financial information for historical periods otherwise required by Regulation S-X as of the time of filing (or confidential submission) provided that (i) the omitted financial information relates to a historical period the EGC reasonably believes will not be required in the Form S-1 or F-1 at the time of the contemplated offering and (ii) prior to the distribution of a preliminary prospectus to investors, the registration statement is amended to include all financial information required by Regulation S-X at the date of such amendment.

The first two modifications are effective immediately. While the third set of changes relating to the omission of certain historical financial information will become effective on January 4, 2016, the Division of Corporation Finance will not object if EGCs apply this provision immediately. Thus, an EGC that is currently planning an IPO in 2016 and intends to market its IPO using 2015 audited financial statements (e.g., audited financials for its most recently completed fiscal year) could omit its 2013 audited financial statements from its registration statement (or confidential submission) if it reasonably believes that those older financial statements will be replaced by the time of its proposed IPO and so long as the registration statement is amended to include the 2015 audited financials before a preliminary prospectus is distributed to investors. While this provision should help to reduce the costs borne by an EGC by eliminating the need for it to prepare financial information that will ultimately be replaced and updated at the time of the IPO, an EGC should evaluate whether including this financial information at the time of its initial filing (or confidential submission) is still merited in order to preview any potential issues with the staff and reduce the amount (or likelihood) of comments later in the process.

ATTORNEY ADVERTISING

Disclosure Modernization

Title LXXII – Disclosure Modernization and Simplification of the FAST Act:

- requires the SEC, by June 1, 2016, to:
  i. issue rules to permit issuers to include a summary page in their annual reports on Form 10-K, but only if each item on such summary page includes a cross-reference (by electronic link or otherwise) to the relevant material contained in the Form 10-K; and
  ii. take action to revise Regulation S-K to scale or eliminate the disclosure requirements in order to reduce the burden on EGCs, accelerated filers, smaller reporting companies, and other smaller issuers and eliminate duplicative, overlapping, outdated, or unnecessary provisions, while still providing all material information to investors, and subject to any necessary studies (including the study described in the next paragraph) to assess the efficacy of such provisions.
- instructs the SEC to conduct a study of Regulation S-K requirements, in consultation with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies, to determine how best to modernize and simplify its requirements in order to reduce the costs and burden on issuers. The SEC shall issue its report to Congress by November 28, 2016, containing its finding and including specific and detailed recommendations, which the SEC shall implement in a rulemaking to be proposed within 360 days of the date of issuance of the report.

In December 2013, the SEC issued a report, mandated by the JOBS Act, to Congress on its disclosure rules for U.S. public companies and provided the staff's preliminary conclusions and recommendations about disclosure reform. The SEC Division of Corporation Finance is currently reviewing the disclosure requirements in Regulation S-K and Regulation S-X, and is considering ways to improve the disclosure regime (the "Disclosure Effectiveness project"). It is not clear how or whether these FAST Act provisions will impact or modify the SEC's current Disclosure Effectiveness project.

Codifying the Section 4(a)(1½) Exemption

Title LXXVI – Reforming Access for Investments in Startup Enterprises of the FAST Act amends, effective immediately, the Securities Act of 1933 by adding a new Section 4(a)(7), which would exempt from the registration requirements of Section 5 of the Securities Act transactions that satisfy the following requirements:

- each purchaser is an accredited investor;
- neither the seller, nor any person acting on the seller's behalf, offers or sells the securities by means of any general solicitation or general advertising;
- the seller is not the issuer or a direct or indirect subsidiary of the issuer;
- neither the seller, nor any person that has been or will be paid a commission, is a "bad actor" under Rule 506(d) or is subject to statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934;
- the issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not a blank check, blind pool, shell company, or special purpose acquisition company;
- if the issuer is neither subject to the reporting requirements of the Exchange Act nor exempt from such reporting requirements pursuant to Rule 12g3-2(b) (or a foreign government), the seller and a prospective purchaser designated by the seller must obtain from the issuer and the seller must make available to a prospective purchaser certain reasonably current (as defined in Section 4(a)(7)) information regarding the issuer, including:
  i. general information regarding the issuer (e.g., the name and address of the issuer, its transfer agent, and corporate secretary, the names of its officers and directors, the names of any persons registered as a broker, dealer, or agent that shall be paid any commission in the offer or sale of the securities, and a reasonably current statement of the nature of the issuer's business, products, and services);

ATTORNEY ADVERTISING

ii. information regarding the securities (e.g., the title, class, and par value of the security, the number of securities outstanding);
iii. reasonably current financial information (e.g., most recent balance sheet and income statements for the two preceding fiscal years (or such lesser period as the issuer has been in operation) that is prepared in accordance with GAAP or, in the case of a foreign private issuer, IFRS; and
iv. if the seller is a "control person" with respect to the issuer, a brief statement regarding the nature of the affiliation and a statement certified by the seller that it has no reasonable grounds to believe the issuer is in violation of the securities laws or regulations.

- the transaction does not involve a security that constitutes an unsold allotment to a broker or dealer as an underwriter of the security or a redistribution; and
- the transaction is with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

The securities issued in such transaction will be deemed to have been acquired in a transaction not involving any public offering and the transaction will not be deemed to constitute a distribution. The securities will be "restricted securities" for purposes of Rule 144 and "covered securities" that are exempt from registration or qualification under state "blue sky" laws. Note that while the legislative intent of these provisions is to facilitate the creation of a secondary market in securities of private companies, the exemption would apply to resales of securities of all issuers, public and private. The new Section 4(a)(7) exemption should provide affiliates of an issuer with an alternative means of liquidity to the traditional use of Rule 144.

Easing Registration for Smaller Reporting Companies

Title LXXXIV – Small Company Simple Registration of the FAST Act directs the SEC to revise Form S-1, not later than January 18, 2016, to allow smaller reporting companies (as defined in Rule 405) to "forward incorporate" by reference in its registration statement any documents that it files with the SEC after the effective date of such registration statement. This change will make it easier for smaller reporting companies to use Form S-1 to facilitate "shelf takedown" transactions.

Please feel free to contact any member of Ropes & Gray's securities & public companies practice group or your usual Ropes & Gray contact with any questions about this Alert.

This alert should not be construed as legal advice or a legal opinion on any specific facts or circumstances. This alert is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. The contents are intended for general informational purposes only, and you are urged to consult your attorney concerning any particular situation and any specific legal question you may have. © 2015 Ropes & Gray LLP

ATTORNEY ADVERTISING