DECEMBER 2015

COMMENTARY

"FAST Act" Highway Bill Signed into Law, Includes Securities Law Changes

Buried within the 1,300-page "Fixing America's Surface Transportation Act," also known as the FAST Act, which President Obama signed on December 4, 2015, are provisions that (i) amend certain sections of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), (ii) require changes to Form 10-K and Regulation S-K, and (iii) codify the so-called Rule 4(1-1/2) exemption for private resales of securities initially acquired in private placements.

JOBS Act Amendments

The FAST Act contains three important changes for companies that qualify as Emerging Growth Companies under the JOBS Act. In particular, the FAST Act:

- Reduces the period that an Emerging Growth Company must have its IPO registration statement on public file with the SEC before launching its road show. This period was reduced from 21 days to 15 days. The change is effective immediately.
- Clarifies that a company that qualifies as an Emerging Growth Company at the time that it submits its confidential registration statement to the SEC in connection with its IPO (or publicly files its IPO registration statement) that subsequently ceases to qualify as an Emerging Growth Company can continue to avail itself of the benefits of the JOBS Act as an Emerging Growth Company until the earlier of the date on which the company consummates its IPO *or* the end of the one-year period beginning on the date the company ceases to be an Emerging Growth Company. Although not explicitly stated in the FAST Act, we interpret this clarification to apply retroactively to those companies that have already submitted or filed an IPO registration statement with the SEC that qualified as an Emerging Growth Company at such time.
- Permits an Emerging Growth Company to omit financial information from its Form S-1 or Form F-1, as applicable (and requires the SEC to amend these Forms to such effect), for certain periods otherwise required by Regulation S-X. Emerging Growth Companies can take advantage of this relief as long as: (i) the omitted financial information relates to a historical period that the company reasonably believes will not be required to be included in the Form S-1 or Form F-1 at the time of effectiveness and (ii) such registration statement is subsequently amended to include

all required financial information. This change, for example, could alleviate the time and expense involved in preparing a Form S-1 or Form F-1 with nine-month financial information for an Emerging Growth Company when the filer reasonably believes it will not consummate its offering until after it will have full-year financial information. This change is effective 30 days after the enactment of the FAST Act.

Disclosure Modernization and Simplification

The FAST Act also directs the SEC to modernize and simplify its disclosure regime through the following means:

- Within 180 days after the enactment of the FAST Act, issue regulations permitting a summary page in a company's Annual Report on Form 10-K as long as each item in the summary cross-references to the material contained in the full Form to which such item relates.
- Within 180 days after the enactment of the FAST Act, revise Regulation S-K to (i) scale back or eliminate disclosure requirements for Emerging Growth Companies, accelerated filers, and smaller reporting companies and (ii) eliminate for all companies provisions that are duplicative, overlapping, outdated, or unnecessary.
- Within 360 days after the enactment of the FAST Act, carry out a study and issue a report, in consultation with the Investor Advisory Committee and the Advisory Committee on Small Emerging Companies, regarding how to best modernize and simplify Regulation S-K in a manner that emphasizes a company-by-company approach to disclosure and that discourages repetitive and immaterial disclosure. Within 360 days after the report is issued, the SEC is required to implement the recommendations included in the report.

New Section 4(a)(7) Exemption

Historically, practitioners have relied on an informal exemption, known as the "Section 4(1-1/2) exemption," from the registration requirements of the Securities Act for private resales of securities by non-issuers (e.g., employees, executive officers, directors, and large shareholders) that were acquired in a private placement. The FAST Act amends the Securities Act to include new Section 4(a)(7), effective immediately, to permit such resales so long as the following requirements are satisfied:

- Each purchaser is an accredited investor;
- Neither the seller, nor any person acting on the seller's behalf, offers or sells the securities by any form of general solicitation;
- The seller and prospective purchaser obtain reasonably current information prescribed in Section 4(a)(7) if the issuer is not subject to the reporting requirements of the Exchange Act;
- The transaction is not a sale of a security by the issuer or a subsidiary of the issuer;
- Neither the seller nor any person that has been or will be paid for their participation in the offer or sale is a "bad actor" (as defined in Regulation D);
- 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, or shell company that has no specific business plan or purpose;
- The securities must not be part of an unsold allotment to, or a subscription or participation by, an underwriter; and
- The class of securities must have been authorized and outstanding for at least 90 days before the transaction.

Securities acquired pursuant to Section 4(a)(7) shall be deemed to have been acquired in a transaction not involving a public offering (essentially meaning a private placement). These securities will, therefore, be restricted securities under Rule 144 of the Securities Act. As a result, subsequent resales will still need to comply with the registration requirements of the Securities Act, or the seller will need to find an available exemption.

New Section 4(a)(7) provides certainty to sellers and other transaction participants as to the exempt status of the transaction compared to having to rely on the previously used uncodified practitioners' theory under so-called Section 4(1-1/2). Prior to the adoption of Section 4(a)(7), a seller seeking to rely on the Section 4(1-1/2) exemption would have to ensure that the purchasers of the securities and any intermediaries were not acting as "underwriters" or, alternatively, qualified as "qualified institutional buyers" of such securities, as defined in the Securities Act. Section 4(a)(7) obviates the need to obtain such assurances.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

Michael J. Solecki
Cleveland
+1.216.586.7103
mjsolecki@jonesday.com

Timothy Curry
Silicon Valley / San Francisco
+1.650.739.3987
tcurry@jonesday.com

Boris Dolgonos
New York
+1.212.326.3430
London
+44.20.7039.5464
bdolgonos@jonesday.com

Alexander A. Gendzier
New York
+1.212.326.7821
agendzier@jonesday.com

Linda A. Hesse
Paris
+33.1.56.59.38.72
lhesse@jonesday.com

James E. O’Bannon
Dallas
+1.214.969.3766
jeobannon@jonesday.com

Timothy J. Melton
Detroit / Chicago
+1.313.230.7969
tmelton@jonesday.com

Edward B. Winslow
Chicago
+1.312.269.4223
ebwinslow@jonesday.com

Adam Jason, an associate in the Cleveland Office, assisted in the preparation of this Commentary.