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Jobs Act Revamped by Fast Act

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The Jumpstart Our Business Startup Act of 2012 (the "JOBS Act") was enacted on April 5, 2012 in an effort to make it easier for certain emerging growth companies (EGCs), generally defined as companies with annual gross revenues of less than $1 billion during their most recent fiscal year, to pursue initial public offerings (IPOs), while also making it easier for companies to raise capital in private offerings and stay privately-held longer. The JOBS Act's overall goal was to enhance access to the capital markets while reducing the costs to raise such capital and, as a result, enable companies to obtain the funds necessary to expand their businesses and, in turn, hire additional employees.

Specifically, the JOBS Act significantly eased the IPO process for EGCs by, among other things: (1) allowing EGCs to test the waters to determine if there was adequate interest in an investment in the company before filing a registration statement with the Securities and Exchange Commission (SEC) and providing a pre-filing confidential review by the SEC staff of the proposed registration statement, (2) scaling back certain disclosure obligations of EGCs, and (3) phasing in compliance with certain corporate governance provisions of the Sarbanes Oxley Act of 2002.

In addition to easing the burden on EGCs to engage in IPOs and become public companies, the JOBS Act added provisions designed to enhance companies' ability to raise funds through transactions that are exempt from registration under the Securities Act. In particular, the JOBS Act: (a) eliminated the prohibition against general solicitation or general advertising in connection with certain private offerings under Rule 506 of Regulation D, (b) adopted a crowdfunding exemption from registration (which takes effect May 16, 2016 under the SEC implementing rules), and (c) increased the thresholds to conduct offerings of up to $50 million under Regulation A.

The JOBS Act also increased the minimum thresholds that trigger the registration requirements under the Securities Exchange Act of 1934 ("Exchange Act") and, as a result, provided more flexibility for companies to avoid such registration.

However, just three and one half years after enactment, Congress determined that the JOBS Act needed updating. Consequently, as a part of the Fixing America's Surface Transportation Act (the "FAST Act"), which became law on December 4, 2015, Congress updated the JOBS Act in five primary ways: (1) reducing further the burdens on EGCs to pursue IPOs; (2) revising the Form S-1 registration statement to make it easier for smaller reporting companies to use, (3) establishing a new private resale exemption from registration; (4) requiring the SEC review and make recommendations on the modernization and simplification of disclosure requirements under Regulation S-K; and (5) revising the Exchange Act to clarify that the registration thresholds established for bank holding companies apply to savings and loan holding companies.

With the exception of the changes to Form S-1 and the review of Regulation S-K to be undertaken by the SEC, these FAST Act provisions are self-executing. In response to the enactment of the FAST Act, the SEC's Division of Corporation Finance (the "Division") issued an announcement on December 10, 2015 containing certain of its views on the application of the FAST Act under certain situations (the "Announcement"), issued and updated certain of its interpretative guidance on December 21, 2015 ("Interpretative Guidance"), and on January 13, 2016 adopted interim rules implementing the mandated changes to registration statements on Forms S-1 and F-1.

Reduced Burdens For IPOs of EGCs

The FAST Act amended the JOBS Act to provide EGCs with additional flexibility to raise capital in three primary ways:

- **Reduced Waiting Period Prior to a Public Offering:** Previously, an EGC was required to publicly file its registration statement and all previously submitted drafts with the SEC no later than 21 days before the date on which the EGC conducted a road show. The FAST Act amended Section 6(e)(1) of the Securities Act of 1933 by reducing the waiting period from 21 to 15 days. Consistent with its JOBS Act interpretations of Section 6(e), the Division stated in the Announcement its view that if an EGC does not conduct a road show, the non-public drafts must be filed at least 15 days before the effectiveness of the registration statement. This revision permits an EGC to bring its offering to the market in a shorter period of time and correspondingly reduce the risks associated with changing markets during the waiting period.
- **Grace Period for Change of Status of EGC:** Previously, an issuer would lose its status as an EGC if it had over $1 billion in revenue in the preceding fiscal year. Under certain circumstances, due to the length of the IPO process, an issuer that had originally qualified as an EGC when it commenced the IPO process could and would lose its EGC status on January 1 of the following year if it exceed more than $1 billion in revenue in the prior year. Consequently, an issuer that lost its EGC status would have to make additional disclosures, incur additional costs in connection with its IPO, and be burdened by additional regulatory compliance requirements. To rectify that situation, under the FAST Act, an issuer that is qualified as an EGC at the time it submitted a draft confidential registration (or publicly files a registration statement) statement will continue to be treated as an EGC through the earlier of (1) the date on which the issuer consummates its IPO or (2) the end of the one year anniversary of the issuer losing its EGC status. In the Announcement, the Division stated that EGCs with registration statements pending at the time of enactment of the FAST Act may rely on the provision.
- **Omission of Certain Financial Information:** Prior to the FAST Act, the SEC would not review an IPO registration statement unless the historical financial statements provided were for the period of time required by SEC rules. Under the FAST Act amendments, EGCs may omit historical financial information for an IPO if (1) the omitted financial information *relates* to a historical period the EGC *reasonably believes* will not be required at the time of offering, and (2) prior to the distribution of a preliminary prospectus to investors, the registration statement is amended to include all financial information required. This provision was to become effective 30 days after the date of enactment of the FAST Act. However, the Division stated in the Announcement that it would not object if EGCs applied this provision immediately.

Additionally, on December 21, 2015, as part of its Interpretative Guidance, the Division issued two interpretations:

- The Division clarified that the interim financial information referenced in the statute "*relates*" to both the interim period and to any longer period (either interim or annual) into which such financial information has been or will be included. An EGC issuer may not omit interim financial statements from its filing or submission that will be included within required financial statements covering a longer interim period or annual period at the time of the offering, even though the shorter period will not be presented separately at the time of *filing*. The Division provided the following example:

  > "[C]onsider a calendar yearend EGC that submits or files a registration statement in December 2015 and reasonably expects to commence its offering in April 2016 when annual financial statements for 2015 and 2014 will be required. This issuer may omit its 2013 annual financial statements from the December filing. However, the issuer may not omit its nine-month 2014 and 2015 interim financial statements because those statements include financial information that relates to annual financial statements that will be required at the time of the offering in April 2016."

- An EGC issuer may omit financial statements of other entities from its filing or submission if it reasonably believes those financial statements will not be required at the time of the offering.

The revised financial statement requirements will eliminate the need to include (and pay for) an audit of a fiscal year that will not need to be included at the time the registration statement is expected to be declared effective. The EGC also will not need to prepare unaudited quarterly financial statements for periods that will not be included in the final prospectus.

These statutory changes were effective upon enactment of the FAST Act.

Revisions to Form S-1 to Reduce Registration Costs for Smaller Reporting Companies

The FAST Act seeks to reduce the costs for smaller reporting companies (SRCs) using the Form S-1 registration statement (which is the primary form used by SRCs for IPOs and resales by selling securities holders) by permitting SRCs to

incorporate by reference filings made with the SEC *after* the date that the registration statement has been declared effective. SRCs generally are companies that have a public float of less than $75 million on the last business day of the company's second quarter or, if there is no public float, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available.

Prior to this provision's implementation, SRCs were only permitted to incorporate by reference filings made with the SEC *before* the date that the registration statement has been declared effective. As a result, SRCs using a Form S-1 registration statement were required to continually update the registration statement by filing supplements or post-effective amendments with the SEC. This process imposed a costly financial burden on such issuers and slowed down the offering process, especially in instances where the offering involved shelf registration or resales by selling securities holders. By permitting SRCs to incorporate SEC filings by in the future in a Form S-1, the shelf offerings and secondary sales process will become less cumbersome because the Form S-1 registration statement may be automatically amended through the filing of certain periodic reports under the Exchange Act.

Notably, the implementation of this provision required rulemaking by the SEC and, on January 13, 2016, the SEC issued interim rules that permit SRCs to use the incorporation by reference of future filings made with the SEC in Form S-1, commencing January 18, 2016.

New Private Resale Exemption From Registration

Securities of a private company acquired in private investment transactions or held by control persons of the private company often are illiquid for a period of time because there is no applicable specific exemption under the Securities Act of 1933 ("Securities Act") for the resale of securities by securities holders. The primary exemptions under Sections 4(a)(1) [transactions other than by an issuer, underwriter, or dealer] and 4(a)(2) [transactions by an issuer not involving a public offering] of the Securities Act do not provide a specific exemption from registration for resales by private investors.

Under Section 4(a)(1), an investor reselling shares acquired in a private investment transaction ("restricted shares") may be deemed an "underwriter" if the shares were purchased from the issuer with a view to further distribution. Because this standard relates to a state of mind at the time of purchase, it is difficult for an investor to become comfortable that his or her motives will not be second guessed in hindsight. Although Rule 144 was established as a safe harbor for resales of such shares (and under which the selling shareholder will not be deemed an "underwriter"), this rule establishes a holding period and has other requirements that must be satisfied as a condition to reliance thereupon. Section 4(a)(2), the so-called private placement exemption, is only applicable to issuers and not to selling shareholders.

Prior to FAST Act, a common-law and industry practice was developed whereby private resales of restricted securities were considered exempt from registration so long as the private resales followed the same sales practices used in connection with private placements by issuers pursuant to Section 4(a)(2) of the Securities Act. This was often referred to as the "Section 4(a)(1½) Exemption."

To address the potential illiquidity of securities acquired in private investment transactions, which may impede private investment in growing companies, the FAST Act, in essence, codified the Section 4(a)(1½) common law exemption by adopting a new exemption from registration under Section 4(a)(7) of the Securities Act.

Section 4(a)(7) provides that private resales of restricted securities will be exempt from registration if the following specific requirements are met:

- Each purchaser is an accredited investor;
- No general solicitation or advertisement is used;
- If the transaction involves non-reporting issuers, such issuers must make available to the prospective purchaser and to the seller certain general information about the issuer, the securities being sold, and certain financial information of the issuer;
- Issuer of the securities must be engaged in the business and must not be in the organizational stage or in bankruptcy, or be a blank check, blind pool or shell company with no specific business plan or purpose;
- The security to be resold is not part of an unsold allotment to, or a subscription or participation by, an underwriter of the securities;
- The transaction is not be conducted by the issuer or a subsidiary of the issuer;
- Neither the seller nor any person that has been or will be paid in connection with the transaction is disqualified as a bad actor under Regulation D or is subject to statutory disqualification;

- If the seller is a control person of the issuer, it must provide a brief statement regarding the nature of the affiliation and a certification that the seller has no reasonable grounds to believe that the issuer is in violation of any securities laws or regulations; and
- The security must be of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

By meeting the above described criteria and certain other requirements, the securities will be considered "covered securities" under Section 18 of the Securities Act, and will be exempt from registration under state blue sky regulations. However, securities sold under Section 4(a)(7) exemption will be deemed restricted securities within the meaning of Rule 144.

This statutory exemption from registration may be useful for holders of restricted shares and affiliates of the issuer holding shares ("control shares") who: (1) wish to sell the shares before the expiration of the holding period set forth in Rule 144, and (2) are affiliates and want to sell shares in excess of the 1 percent limitations of Rule 144. Although this exemption is available for resale of shares issued by either public or privately-held companies, it may be more difficult to use if the issuer is not a reporting company because the seller will need the issuer's cooperation to provide the required information to the purchasers.

These provisions were effective upon enactment of the FAST Act.

Disclosure Modification And Simplification

Building on the JOBS Act mandate that the SEC undertake a study to simplify and modernize the disclosure requirements of Regulation S-K, the FAST Act requires the SEC to revise Regulation S-K as follows by June 1, 2016:

- promulgate regulations that permit issuers to present a summary page on Form 10-K, so long as they include cross-references to the material contained in Form 10-K to which it relates.
- scale or eliminate duplicative, overlapping, outdated, or unnecessary requirements of Regulation S-K for all issuers in order to reduce the burden on EGCs, accelerated filers, SRCs and other small issuers.

The FAST Act also requires the SEC to conduct a study to assess the requirements contained in Regulation S-K, with the goal of: (1) determining how to best modernize and simplify such requirements in a manner that reduces costs and burdens on issuers while still providing all material information, (2) emphasizing a company by company approach that allows relevant and material information to be disclosed to investigators without boilerplate language or static requirements while preserving completeness and comparability of information across registrants, and (3) evaluating methods of information delivery and presentation, and exploring methods for discouraging repetition and disclosure of immaterial information.

Savings And Loan Holding Companies

The FAST Act also amended Sections 12(g) and 15(d) of the Exchange Act to provide equal treatment of savings and loan holding companies to bank holding companies as follows:

- Savings and loan holding companies will have a Section 12(g) registration obligation if there is a class of equity security held of record by 2,000 (rather than 500 non-accredited investors) or more persons and there are $10 million in assets.
- The threshold for Section 12(g) deregistration and for suspension of reporting under Section 15(d) is increased to 1,200 persons from 300 persons.

In response to the enactment of these amendments, the Division issued an Interpretative Guidance which provides that:

- Savings and loan holding companies will be treated in a similar manner as bank holding companies for purposes of registration, termination of registration, or suspension of Exchange Act reporting requirements.
- If a savings and loan holding company has filed an Exchange Act registration statement and the registration statement is not yet effective, then it may withdraw the registration statement. However, if a saving and loan holding has registered a class of equity securities under Section 12(g), it will need to continue that registration unless it is qualified for deregistration under Section 12(g).
- If a class of securities of a savings and loan holding company is held of record by less than 1,200 persons, it a may file a Form 15 to terminate a Section 12(g) registration. The Division further advised that the savings and loan holding company should include an explanatory note in its Form 15 filing indicating that it is relying Exchange Act Section 12(g)(4) to terminate its obligation to file reports. Importantly, since Form 15 terminations are effective 90 days after the date of filing, the savings and loan holding company should continue to file all applicable reports required under the Exchange Act until the termination is effective.
- A savings and loan holding company may suspend its obligation to file reports under Section 15(d) of the Exchange Act with respect to any class of securities held of record by less than 1,200 persons as of the first day of the current fiscal

year, and such suspension would be deemed to have occurred at the beginning of the fiscal year. (unless that savings and loan holding company has a registration statement that has become effective or is updated during the current fiscal year (other than updating pursuant to Section 10(a)(3) of the Exchange Act and no sales have been made under the registration during the current fiscal year)).

These amendments were effective upon enactment of the FAST Act.