

The Transportation FAST Act Helps Smooth the JOBS Act's "On Ramp"

A number of amendments to U.S. securities laws were included in the Fixing America's Surface Transportation Act (the "FAST Act") to ensure bipartisan support and passage of the bill, which was signed into law on Friday, December 4, 2015. These amendments are designed to ease the burden on companies raising money in both the private and public capital markets.

Easing the On Ramp for EGCs

The JOBS Act of 2012 helped streamline the registration and disclosure process for companies new to the public markets that qualified as "Emerging Growth Companies" or "EGCs." The FAST Act provides some additional registration process relief to EGCs, first, by reducing the time an EGC's registration statement must be publicly filed before it can be declared effective from the current 21 days to 15 days. This relief is immediately effective with the enactment of the FAST Act.

The FAST Act also simplifies the financial statement disclosure of EGCs on Form S-1 and Form F-1 to allow a confidentially-filed draft registration statement to be submitted without the financials for a historic period if the issuer reasonably believes the older financial information will not be required to be included in the Form S-1 or F-1 at the time of the eventual offering because a new fiscal year's financial information will be available. For example, if an issuer submits a draft registration in early January 2016 in anticipation of an offering in April 2016, and by April the issuer will be able to include audited financials for 2015, the issuer would be able to count the 2015 financial statements as one of the financial statements required by Regulation S-X and can submit the draft registration statement omitting an earlier period in reliance on the eventual inclusion of the 2015 financial statements. An issuer relying on this provision must include all the required financial information before distributing a preliminary prospectus to investors.

The FAST Act specifically allows issuers to rely on this simplified disclosure effective 30 days after the law is enacted (in this case, beginning Monday, January 4, 2016) and requires the SEC to amend Form S-1 and Form F-1 to reflect this revision also within 30 days. The FAST Act does not provide that an issuer filing a registration statement on another form, including Form S-11, can also rely on this simplified disclosure, though perhaps the SEC will level the playing field when amending the registration forms.

One further provision in the FAST Act provides that a company that loses its EGC status during the registration process will continue to be treated as an EGC until the earlier of the completion of its initial offering or one year from the date it lost its EGC status. This relief is also immediately effective.

Bolstering Private Re-Sales

The FAST Act provides a statutory basis for what is referred to as the "Section 4(a)(1½) Exemption" for private resales of restricted securities by adding a new Section 4(a)(7) to the Securities Act of 1933. This new section will permit resale transactions to accredited investors if certain conditions are met. These conditions include:

Issuer requirements

- The issuer must be engaged in business and cannot be in the organizational stage or in bankruptcy and cannot be a blank check, blind pool, or shell company that has no specific business plan or purpose.

Seller requirements

- The seller cannot be the issuer or its subsidiary.
- The seller or anyone paid to participate in the sale cannot be a "bad actor" under Rule 506(d)(1) of Regulation D.

Purchaser requirements

- Each purchaser must be an accredited investor.

Securities requirements

- Securities must be part of a class that been outstanding for at least 90 days.
- The securities are not part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution

Offering requirements

- The seller and anyone acting on behalf of the seller may not make offers or sell securities by any form of general solicitation or general advertising.
- The seller, through the cooperation of the issuer, makes certain information about the issuer and the securities available to prospective purchasers including a recent balance sheet and profit and loss statement and similar financial statements.

This statutory exemption may help bolster the trading on certain secondary markets that have evolved to help provide liquidity to investors in restricted securities, especially since securities sold under Section 4(a)(7) are "covered securities" and these transactions will not be subject to state Blue Sky laws. We expect that those transactions that cannot qualify for this new Accredited Investor Resale safe harbor will still be able to rely on the current "Section 4(a)(1½) Exemption."

Additional Provisions

The FAST Act requires the SEC to adopt rules within 180 days of enactment to permit issuers to "submit a summary page on form 10-K". Each item on such summary page must include a cross-reference (by electronic link or otherwise) to the material contained in the Form 10-K to which the item relates.

Smaller reporting companies also get some relief that will make it easier to use Form S-1 as a "shelf registration statement." The FAST Act gives the SEC 45 days to amend Form S-1 to permit "forward incorporation by reference" for smaller reporting companies. By allowing smaller reporting companies to incorporate by reference any documents that such company files with the SEC after the effective date of such registration statement, those companies will not need to update their registration statements by filing multiple post-effective amendments that simply duplicate the information already on file in the SEC's EDGAR system. We again note that this is for Form S-1 only under the new statute.

We are happy to discuss these new developments at any time.

Authors

Andrew Epstein

Partner
T: +1 212 878 8332
E: andrew.epstein
@cliffordchance.com

Larry Medvinsky

Partner
T: +1 212 878 8149
E: larry.medvinsky
@cliffordchance.com

Jason Myers

Partner
T: +1 212 878 8324
E: jason.myers
@cliffordchance.com

Kathleen Werner

Partner
T: +1 212 878 8526
E: kathleen.werner
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2015
Clifford Chance US LLP

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.