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SEC/CORPORATE

FAST Act Legislation and Impact on Securities Law

On December 4, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act). This transportation bill includes several provisions related to securities laws and capital-raising measures, as summarized below.

Improving Access to Capital for Emerging Growth Companies

- The FAST Act amends Section 6(e)(1) of the Securities Act of 1933 (Securities Act) to require that an emerging growth company (EGC) file its confidential submission of its initial public offering (IPO) registration statement with the Securities Exchange Commission only 15 days, rather than 21 days, prior to the commencement of the IPO roadshow. The amended section also provides that any issuer that was an EGC at the time it submitted a registration statement to the SEC, but lost its EGC status thereafter, will continue to be treated as an EGC for one year after it ceased to be an EGC or until it completes its IPO, whichever is earlier.
- The FAST Act requires that the SEC revise Form S-1 and F-1 registration statements to permit EGCs to omit Regulation S-X financial information for historical periods otherwise required at the time of filing (or confidential submission), provided that the issuer reasonably believes the omitted financial information will not be required in the Form S-1 or F-1 at the time of the contemplated offering and that, prior to the issuer distributing a preliminary prospectus, such registration statement is amended to include all required Regulation S-X financial information at the date of such amendment. EGCs may rely on these provisions 30 days after enactment of the FAST Act.

Disclosure Modernization and Simplification

- The FAST Act requires that the SEC issue regulations within 180 days after enactment to:
  - permit issuers to include a summary page in an annual report on Form 10-K, but only if each item on the summary page provides a cross-reference to the applicable material in the Form 10-K; and
  - revise Regulation S-K to (i) further scale or eliminate certain requirements of Regulation S-K to reduce the burden on EGCs, accelerated filers, smaller reporting companies and other smaller issuers, while still providing all material information to investors, and (ii) eliminate provisions of Regulation S-K for all issuers that are duplicative, overlapping, outdated or unnecessary.
- The FAST Act also requires that the SEC conduct a study of Regulation S-K, in consultation with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies, to:
  - determine how best to modernize and simplify Regulation S-K in a manner that reduces the costs and burdens on issuers while still providing all material information;
  - emphasize a company-by-company approach that allows relevant and material information to be disseminated to investors without boilerplate language or static requirements, while preserving the completeness and comparability of information across registrants; and
  - evaluate methods of information delivery and presentation, and explore methods to discourage repetition and the disclosure of immaterial information.

- Within 360 days after enactment of the FAST Act, the SEC is required to issue a report to Congress containing its findings and recommendations relating to its study and, within 360 days thereafter, issue a proposed rule to implement its recommendations.

Reforming Access for Investments in Startup Enterprises

The FAST Act amends Section 4 of the Securities Act to exempt from registration certain resales of securities in a manner similar to the so-called "4(a)(1½)" private resale exemption. The new exemption, codified as Section 4(a)(7) of the Securities Act, is available for transactions that meet the following requirements:

- each purchaser is an accredited investor;
- neither the seller, nor any person acting on seller's behalf, offers or sells securities through general solicitation or advertising;
- in the case of an issuer that is not a reporting company, a company exempt from reporting requirements pursuant to Rule 12g3-2(b), or a foreign government eligible to register securities on Schedule B, at the request of the seller, the seller and a prospective purchaser designated by the seller obtain from the issuer reasonably current information concerning the issuer, including the issuer's identity and its business and products, the securities, the transfer agent, the issuer's officers and directors, any compensated brokers or dealers, the issuer financial statements for the two preceding fiscal years, and 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 that the issuer is in violation of the securities laws or regulations;
- 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" pursuant to Rule 506 under the Securities Act or is subject to a disqualification described 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, and is not a blank check, blind pool or shell company;
- the transaction does not involve an unsold allotment to, or a subscription or participation by, an underwriter 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.

The securities sold in a Section 4(a)(7) resale transaction are deemed restricted securities under Rule 144 and "covered securities" for blue sky preemption purposes.

Small Company Simple Registration

The FAST Act requires that the SEC revise Form S-1 to permit a smaller reporting company to incorporate by reference in its registration statement documents that the company files with the SEC after the effective date of the registration statement (i.e., "forward incorporation by reference").

Click here to view the complete text of the Fast Act.

View Our 2016 Proxy Season Update Webinar

On December 9, Katten Muchin Rosenman LLP, Ernst & Young LLP and Georgeson Inc. hosted a webinar discussion of key developments and trends impacting public companies in the 2016 annual report and proxy season.

The presentation is available here.

BROKER-DEALER

FINRA Issues Notice on Providing Stock Quotations to Customers

The Financial Industry Regulatory Authority released Regulatory Notice 15-52 to remind firms and registered representatives of their obligations under the Vendor Display Rule of Regulation NMS. Under the Vendor Display Rule, vendors and broker-dealers are required to provide customers with a consolidated display of information

from all the market centers on which a given security is traded. FINRA noted that the Securities and Exchange Commission staff recently made clear in the denial of a no-action request that relying on non-consolidated market information when giving quotes to customers is inconsistent with the Vendor Display Rule. Based on this SEC staff position, FINRA recommends that vendors and broker-dealers ensure that a consolidated display of market data is being used when providing quotation information to customers.

FINRA Regulatory Notice 15-52 is available here.

FINRA Issues Notice on Member Website References and Hyperlinks to BrokerCheck

The Financial Industry Regulatory Authority released Regulatory Notice 15-50, which discusses the Securities and Exchange Commission's approval of amendments to FINRA Rule 2210 (Communications with the Public). The amendments relate to heightened disclosure standards for references and hyperlinks to the BrokerCheck system on member firm websites. Under the revised rule, member firms' websites will need to include a readily apparent reference and hyperlink to BrokerCheck. The reference and hyperlink to BrokerCheck must be located on the first webpage a member firm intends to be viewed by retail investors, as well as any other webpage that includes a professional profile of one or more registered persons who conduct business with retail investors. In assessing what constitutes "readily apparent," FINRA will use a "reasonable retail investor" standard that assesses factors such as the placement, font size and font color of the reference and hyperlink.

FINRA Regulatory Notice 15-50 is available here.

DERIVATIVES

See "CFTC Extends Continued No-Action Relief From Certain Recordkeeping Requirements," "CFTC To Hold an Open Commission Meeting To Consider Final and Proposed Rules" and "NFA Issues Notice on the Inclusion of Legal Entity Identifiers in the Swap Dealer/Major Swap Participant Registry" in the CFTC section.

CFTC

CFTC Extends Continued No-Action Relief From Certain Recordkeeping Requirements

The Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight and Division of Market Oversight (collectively, Divisions) have issued CFTC Letter No. 15-65, which indefinitely extends the no-action relief from certain recordkeeping requirements under CFTC Regulation 1.35(a), which was previously provided in CFTC Letter No. 14-147. (CFTC Letter No. 14-147 was discussed in detail in the December 19, 2014 edition of *Corporate and Financial Weekly Digest*.)

In CFTC Letter No. 15-65, the Divisions reaffirm that they will not recommend an enforcement action against a commodity trading advisor (CTA) that is a member of a designated contract market or swap execution facility for failing to comply with the oral recordkeeping requirements under Regulation 1.35(a). In addition, the Divisions will not recommend an enforcement action against any market participant that is subject to Regulation 1.35(a), on the grounds that its records of oral and written communications that lead to the execution of a transaction are not linked to or otherwise identified with a particular transaction. This no-action relief will expire on the effective date of any final CFTC action regarding the proposed amendments to Regulation 1.35(a), which were published for comment in November 2014 (79 Fed. Reg. 68140 (Nov. 14, 2014)).

CFTC Letter No. 15-65 is available here.

CFTC To Hold an Open Commission Meeting To Consider Final and Proposed Rules

The Commodity Futures Trading Commission announced it will hold an open meeting on Wednesday, December 16 at 10:30 a.m. (ET). The meeting agenda includes a discussion of proposed rules regarding the Division of Clearing and Risk's system safeguards and the Division of Market Oversight's system safeguards testing requirements. The meeting also will include a discussion of a final rule related to margins for uncleared swaps.

The meeting is open to the public and also can be accessed via live webcast or conference call.

More information is available here.

NFA Issues Notice on the Inclusion of Legal Entity Identifiers in the Swap Dealer/Major Swap Participant Registry

The National Futures Association (NFA) has issued Notice I-15-28, which discusses the legal entity identifiers (LEIs) that are now being used in the NFA's swap dealer/major swap participant registry (SD/MSP Registry). The SD/MSP Registry provides a single, consolidated listing of all swap dealers and major swap participants, in addition to their CFTC registration status. Numerous entities, including swap data repositories and the International Swaps and Derivatives Association, requested the addition of LEIs to increase the usefulness of the information available through the SD/MSP Registry. NFA reminds members using the SD/MSP Registry to update their systems and procedures to reflect this change by July 1, 2016.

NFA Notice I-15-28 is available here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

Federal Highway Bill Eliminates Annual Privacy Notice Requirement for Financial Institutions

On December 4, President Obama signed the "Fixing America's Surface Transportation Act'' or the ''FAST Act." In addition to providing for highway and transportation spending, section 750001 of the FAST Act amended Section 503 of the Gramm-Leach-Bliley Act (GLBA) by eliminating under certain circumstances the GLBA requirement that financial institutions provide annual privacy notices (new GLBA Section 503(f)). *For a more general look at the FAST Act, see "FAST Act Legislation and Impact on Securities Law" in the SEC/Corporate section.*

The GLBA amendments provide that financial institutions are no longer required to provide annual privacy notices unless there has been a change in the institution's privacy policies or the institution shares nonpublic personal information with outside parties for marketing purposes. Investment companies, registered and private fund advisors and broker-dealers, among others, are considered financial institutions for GLBA purposes.

The FAST Act also provides a new Securities Act of 1933 (1933 Act) Section 4(a)(7) exemption from registration for private offers and re-sales by non-issuer sellers of privately offered securities to accredited investors so long as various requirements are met. In addition, the FAST Act also requires that the SEC modernize and simplify disclosure requirements under Reg. S-K and provide a summary page for Form 10-K. The FAST Act also amends the Investment Advisers Act of 1940 (Advisers Act) to simplify registration requirements for advisors to small business investment companies.

Since the FAST Act does not state a date for the effectiveness for the amendments to the GLBA, the 1933 Act or the Advisers Act, these amendments became effective upon the President's December 4 signing.

The FAST Act can be found here.

EU DEVELOPMENTS

Ban on Short Selling Shares of Five Greek Banks Extended

On December 7, the European Securities and Markets Authority (ESMA) published an opinion agreeing with the Greek regulator, the Hellenic Capital Markets Commission (HCMC), that the ban on short selling shares in five Greek banks should be extended until midnight on December 21. The ban, previously discussed in the *Corporate and Financial Weekly Digest* edition of October 2, was originally set to expire on November 9 and had been extended until December 7.

The ban includes Greece's four largest banks and one smaller bank—National Bank of Greece, Alpha Bank, Eurobank Ergasias SA and Piraeus Bank, as well as Attica Bank—and prohibits the sales of shares covered by

subsequent intraday purchases, as well as all depository receipts (ADRs, GDRs) and warrants representing shares of such banks— even those part of the FTSE/ATHEX Index.

The HCMC commented that lifting the ban could potentially increase both price volatility in the banks' shares and market uncertainty—particularly at a time when the relevant banks are in the process of being recapitalized, with an anticipated completion by mid-December. The HCMC added that the successful conclusion of the bank recapitalization and restructuring process, as well as the trading of new shares issued by the banks, is required to safeguard the stability of the financial system and of the Greek capital market—all of which ESMA ultimately supported, resulting in its endorsement of the short selling ban extension.

The ESMA opinion is available here.

EU Announces Agreement on New Cybersecurity Directive

On December 7, the European Parliament and the Luxembourg Presidency of the EU Council of Ministers (Council) announced that they have reached agreement on the text of the proposed new EU Cybersecurity Directive (Directive).

While the agreed (and likely final) text of the Directive has not yet been published, this announcement marks a significant milestone in the passage of the Directive into European law. The European Commission (EC) launched a public consultation on a new EU-wide strategy for network and information security in July 2012, finding that 57 percent of respondents had experienced security problems, data breaches, and/or hacking during the previous year. Subsequently, on February 7, 2013, the EC published proposed text for the new Directive and proposals for a new EU cybercrime strategy. The proposals were debated at length during the last 34 months and passed through the European Union's "ordinary legislative procedure," resulting in a full agreement on the final text in both Parliament and the Council.

Based on prior iterations, it is anticipated the Directive will include:

- a requirement for EU member states to adopt a national strategy for network and information security;
- measures requiring EU member states to designate a national authority to prevent, handle and respond to network information security risks and incidents;
- the establishment of a co-operation network between the EC and EU national authorities, including an "early warning system" for cybercrime incidents—particularly when they are large scale incidents or have a cross-border element;
- requirements for national authorities to publish information about ongoing early warnings on a dedicated website, as well as maintaining a secure information-sharing infrastructure to allow for the exchange of sensitive and confidential information within the co-operation network; and
- measures requiring "public administrations" and "market operators" to manage security risks and report security incidents to their national authority. A "market operator" will be defined as a "provider of information society services that enable the provision of other information society services" (including e-commerce platforms, Internet payment gateways, social networks, search engines, cloud computing services and application stores) and a "market operator" will include providers of critical infrastructure essential for the "maintenance of vital economic and societal activities in the fields of energy, transport, banking, stock exchanges and health."

The final text should be published on December 18 for formal approval by EU member states. They will have 21 months to implement the Directive into their respective national laws, meaning that the effective date for the Directive should be in September or October 2017.

The press releases from EU authorities on the new Directive are available online from Parliament, the EC and the Council.

ESMA Publishes Updated Q&A on AIFMD

On December 2, the European Securities and Markets Authority published an updated Questions and Answers (Updated Q&A) on the Alternative Investment Fund Managers Directive (AIFMD). The Updated Q&A focuses on Section III regarding the reporting of information to national competent authorities.

Among other issues, the Updated Q&A notes that all leveraged loans, whether syndicated or otherwise, should be disclosed as leveraged loans. Additionally, alternative investment fund managers (AIFMs) are required to report cash from repurchase agreements as cash borrowings. Further, AIFMs should exclude the investments of alternative investment funds (AIFs) in other AIFs they manage for the purpose of calculating the total value of assets under management.

A copy of the Updated Q&A can be found here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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