Simpson Thacher

JOBS Act 2.0

IPO-Related Provisions of the FAST Act and Impact of the JOBS Act on the IPO Market

December 11, 2015

IPO-Related Provisions of the FAST Act

- On December 4, 2015, the *Fixing America's Surface Transportation Act* (or "FAST Act") was signed by President Obama and became law
- The FAST Act includes three IPO-related provisions for EGCs that build on the *Jumpstart Our Business Startups Act* (or "JOBS Act") enacted on April 5, 2012 to enhance further access to the IPO market by EGCs
  - Reduction in required time period between public filing and roadshow
  - Grace period for loss of EGC status during IPO process
  - Ability to omit financial information for periods that will roll off prior to circulation of preliminary prospectus

IPO-Related Provisions of the FAST Act

Reduction in Required Time Period Between Public Filing and Roadshow

- Reduces from 21 to 15 the number of days prior to a roadshow that an EGC must publicly file its registration statement
- Effective December 4, 2015

IPO-Related Provisions of the FAST Act

Grace Period for Loss of EGC Status During IPO Process

- If a company was an EGC when it commenced SEC review process for its registration statement (whether through confidential submission or public filing), but ceases to be an EGC during the IPO process, it will still be treated as an EGC through the earlier of:
  - the date it consummates its IPO
  - one year after it has lost its EGC status
- Grace period only expressly amends provision relating to confidential submission, but we are optimistic that the SEC will allow EGCs using the grace period to also continue to take advantage of special disclosure rules for EGCs
- Effective December 4, 2015

IPO-Related Provisions of the FAST Act

Ability to Omit Financial Information That Will Roll Off Prior to Circulation of Preliminary Prospectus

- An EGC that files a registration statement (or submits it for confidential review) on Form S-1 or Form F-1 may omit financial information for historical periods otherwise required if:

  (1) the omitted financial information relates to a historical period that the issuer reasonably believes will not be required to be included in its registration statement at the time of the contemplated offering and

  (2) 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 time of the amendment

- On December 10, 2015 the Division of Corporation Finance of the SEC issued interpretive guidance:
  - confirming that this provision permits an EGC to omit not only an earlier year of its own audited annual financial statements from filings or submissions where the requirement to include such year will roll off before the circulation of the preliminary prospectus, but also financial statements of other entities (such as acquired businesses) if it reasonably believes that those financial statements will not be required at the time of the offering
  - clarifying than an EGC may not omit financial statements for an interim period that will be included within required financial statements for a longer interim or annual period at the time of the offering, even though the shorter period will not be presented separately at that time

- The staff of the SEC has announced that they will not object if EGCs apply this provision immediately

Impact of JOBS Act on IPO Market

Key Takeaways of Impact of JOBS Act on IPOs

- Confidential SEC Staff Review
  - EGCs entitled to confidential review of the registration statement for their IPO
  - **Takeaway:** Nearly all EGCs submit confidentially
- Reduced Executive Compensation Disclosure for EGCs
  - Generally required to disclose compensation of three (rather than five) executive officers
  - Not required to present Compensation Discussion & Analysis (CD&A)
  - **Takeaway:** Nearly all EGCs present executive compensation for fewer executive officers and omit CD&A
- Reduced Financial Information Disclosure for EGCs
  - Two years of audited financial statements (rather than three) required
  - **Takeaway:** Inclusion of two years of audited financials (rather than three) has correlated with the size of the company and availability of three years of audited financial statements

Impact of JOBS Act on IPO Market

Key Takeaways of Impact of JOBS Act on IPOs

- Testing the Waters
  - EGCs may make oral and written communications with certain institutional investors before or after filing registration statement to gauge investor interest in contemplated securities offering
  - **Takeaway:** Market practice around TTW continues to develop
- Research
  - Reduced restrictions on research reports and the role of securities analysts
  - **Takeaway:** Underwhelming impact; IPO research practices have not changed materially due to JOBS Act changes

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Josh Bonnie is one of the preeminent IPO lawyers in the nation and regularly counsels public companies on spin-offs and other significant strategic transactions, capital markets offerings, and general corporate and securities law matters. Josh has advised many companies on their initial public offerings, including Hilton Worldwide, The Carlyle Group, Blackstone, MasterCard and Accenture. Josh has extensive experience with complex IPOs, including those employing UP-C and other multiple-tier umbrella partnership structures.

Josh has also advised on spin-offs and other significant strategic transactions, including:

- Blackstone on its 2015 spin-off of its financial advisory businesses and its 2007 sale of $3 billion of non-voting common units to a sovereign wealth fund established by the People's Republic of China
- Ingersoll Rand on its 2013 spin-off of its commercial and residential security businesses and 2009 reorganization incorporating its parent company in Ireland
- The Carlyle Group on the 2010 and 2007 investments in that firm by Mubadala Development Company, the Abu Dhabi–based strategic development and investment company

Josh has been featured in *The American Lawyer*'s "Dealmakers of the Year," is recognized in *Chambers Global: The World's Leading Lawyers for Business*, *Chambers USA: America's Leading Lawyers for Business* and *The Legal 500 United States* as one of the leading capital markets practitioners in the United States, and is endorsed by *PLC Which Lawyer? Chambers* says "Josh Bonnie is 'excellent – very bright and very practical.'"

- Ares Management L.P. on its 2014 IPO
- MasterCard on its first euro-denominated bond offering in 2015, its inaugural bond offering in 2014 and its 2006 IPO, the largest U.S. IPO of the year
- Hilton Worldwide on its 2013 IPO, the largest IPO in history by a hospitality company and second largest U.S. IPO of the year
- Brixmor Property Group on its 2013 IPO, the third largest IPO in history by a U.S. REIT
- Quintiles on its 2013 IPO
- The Carlyle Group on its 2012 IPO and on all of its subsequent capital markets offerings
- Blackstone in its 2007 IPO, the largest U.S. IPO of the year, and on all of its subsequent capital markets offerings
- Evercore on its 2006 IPO and on all of its subsequent capital markets offerings

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Joe Kaufman, a Partner in our Capital Markets Practice, has a rich and varied practice assisting clients on their public and private offerings of debt and equity securities, as well as on corporate governance and other issues. In 2011, he advised HCA on its $4.35 billion IPO—the largest U.S. private equity–backed IPO ever at that time. He has also advised KKR, Aramark, Del Monte Foods, Nielsen and Dollar General.

The National Law Journal recently cited him as one of the top three "Most Influential Lawyers" in Finance and Capital Markets. A few years ago, he wrote an article for *The Deal* on how *The Apprentice* can teach valuable lessons on real-world negotiating.

In his spare time, Joe is an avid swimmer and annually swims across Long Island Sound to raise money for cancer research, prevention and treatment on behalf of Swim Across America.

- First Data in its $2.94 billion IPO
- Aramark in its $834 million IPO
- HCA in its $4.35 billion IPO, at the time the largest private equity–backed IPO ever in the U.S.
- Nielsen in its $1.89 billion IPO
- Dollar General in its $776 million IPO
- Multiple high yield and secondary equity offerings for these companies and others
- The Mosaic Company in $8.7 billion in secondary equity offerings during 2011 relating to Mosaic's split-off from Cargill
- KKR in its business combinations with KKR Financial LLC and KKR Private Equity Investors L.P.
- Wyeth in its sale to Pfizer and its issuance of over $12 billion of notes and convertible debentures

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