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GT Insights for Public Companies

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In this Issue:

SEC | Corporate Governance

SEC

Rule 701 Amendment to Increase Threshold for Heightened Disclosure Requirements

On May 24, President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act. While principally aimed at relaxing certain elements of the Dodd-Frank Act, the Act also amends certain other provisions of the securities laws, including Rule 701. Rule 701 provides an exemption for non-public companies to grant equity awards to directors, officers, employees, consultants, and advisors. Currently, if the amount of securities sold during a 12-month period exceeds $5,000,000, Rule 701 requires a non-public company to provide certain heightened disclosure to these persons a reasonable period of time prior to the sale, including financial statements, a description of material elements of the plan and risk factors. Section 507 of the new law directs the SEC to, within 60 days, amend Rule 701 to increase the threshold for providing additional disclosures to $10,000,000 in aggregate sales during any 12-month period. Additionally, Section 507 of the Act calls for inflation adjustment of the aggregate sales price threshold every five years.

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Expansion of Reg. A+ Exemption to Reporting Companies

The Economic Growth, Regulatory Relief, and Consumer Protection Act also permits Exchange Act reporting companies to use the Reg. A+ exemption and streamlines the reporting requirements by allowing public companies to meet their requirements through their normal SEC filings. Previously, the Reg. A+ rules stated that a company could not use Reg. A+ if it was subject to the SEC reporting requirements under the Exchange Act immediately prior to the offering. In addition, Reg. A+ previously mandated a specified reporting regime that was separate from the SEC reporting requirements.

The expansion is particularly beneficial to the OTC Markets Group, with its CEO calling it a "key change [that] will be instrumental in leveraging technology to fuel small company capital formation and increase the number of public companies that can efficiently access our capital markets."

Reg. A+ allows companies to raise as much as $50 million from both accredited and non-accredited investors over a 12-month period. Companies are not restricted in their ability to publicly advertise Reg. A+ offerings. For example, companies can freely engage in "test the waters" presentations that involve the online or broadcast promotion of their public offering to anyone. Also, in certain cases, Reg. A+ offerings preempt state-blue sky laws meaning state registration of the offerings are not required.

Form 11-K Filing Deadline Approaching

Companies that have employee stock purchase, savings and similar plans with, interests that constitute securities registered under the Securities Act of 1933, must file an annual report on Form 11-K with respect to the plan. The Form 11-K includes audited financial statements of the plan. This report much be filed even though the company also files annual reports on Form 10-K or Form 20F. Form 11-Ks are due on Thursday, June 29, 2018. If a company is unable to file its Form 11-K on time, it must file a Form 12b-25 by June 30 and then file its 11-K within 15 days of its 12b-25 submission.

Corporate Governance

CII Urges IPO Companies to Reconsider Dual-Class Structures

The Council of Institutional Investors (CII) has long voiced strong opposition to dual class capital structures, which include the creation of a low-vote class of common stock entitled to one vote per share and a high-vote class of common stock entitled to several votes per share (often 10). CII argues that dual class structures are directly at odds with the one share, one vote bedrock principle of shareholder democracy.

Over the past six months, CII has sent five letters to technology companies encouraging their boards to reconsider using a dual class structure as a public company or to incorporate sunset provisions that revert to a one share, one vote structure within seven years. In the letters, CII acknowledges that some technology companies have attracted capital on public markets despite having dual-class structures but noted that the performance record of those companies is decidedly mixed, with the evidence suggesting that unequal voting structures do not enhance company value beyond the short-term. The letters also emphasize that the one share, one vote approach has been underscored repeatedly by market participants, including the recent decisions by index providers S&P Dow Jones and MSCI, to exclude companies with dual class structures from being included on certain indices in an effort to discourage dual-class arrangements.

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In addition, in an unrelated letter to MSCI, CII supported MSCI's proposal to weight companies in its indexes based on whether they have unequal voting structures and they suggest exemption relief for companies that adopt a seven-year sunset provision. CII does concede that a sunset structure could be renewed for additional seven-year terms if approved by a majority of the shares with inferior voting rights – and that existing index constituents should have 3 years to adopt a sunset provision before getting dinged by MSCI's weighting feature.

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