May 2, 2017

The Senate Banking Committee Passes Several Pro-Business Bills

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

On March 9, 2017, the Senate Banking Committee approved the first set of bills to go through the committee under the new administration. The five bills were cleared as one package and are aimed at making it easier for companies to grow and raise capital. The bills are bipartisan and could be some of the first to pass through Congress under the new regime. Only two Democrats opposed the bills: Massachusetts Senator Elizabeth Warren, who is consistently pushing for greater investor protections regardless of the impact on businesses, and Rhode Island Senator Jack Reed.

Interestingly, in 2016, most of these pro-business bills were passed by the House and never made it through the Senate. Each of the current bills had already been presented in prior years, either as stand-alone bills or packaged with other provisions, but never made it through the Senate. The following is a summary of the new bills.

Fair Access to Investment Research Act of 2017 (S.327)

The Fair Access to Investment Research Act would require the SEC to expand a safe harbor for certain investment fund research reports. The bill would amend Rule 139 covering the publications or distributions of research reports on investment funds by brokers or dealers distributing securities. In particular, the bill clarifies that a covered investment fund research report that is published or distributed by a broker-dealer would not be deemed an offer for sale or offer to sell a security under Sections 2(a)(10) or 5(c) of the Securities Act of 1933, even if such broker-dealer was participating in a registered offering of that fund's securities. The bill would require FINRA to make conforming changes as well.

Section 2(a)(10) of the Securities Act defines the term "prospectus" and Section 5(c) prohibits the offer or sale of securities unless a registration statement has been filed (or there is a valid exemption from registration). The Fair Access to Investment Research Act would remove investment fund research reports from the definition of an offer for sale or offer to sell and related prospectus delivery requirements.

The House passed a substantially similar provision as part of the Financial Choice Act—to wit: the H.R. 5019 – Fair Access to Investment Research Act (expanding exclusion of research reports from the definition of an offer for or to sell securities under the Securities Act).

Previously, Title I of the JOBS Act amended Section 2(a)(3) of the Securities Act to eliminate restrictions on publishing analyst research and communications while IPO's for Emerging Growth Companies (EGC's) are under way. Section 2(a)(3) defines the terms sale or sell and related offers. Under prior law, research reports by analysts, especially those participating in an underwriting of securities of the subject issuer, could be deemed to be "offers" of those securities under the Securities Act and, as a result, could not be issued prior to completion of an offering. Section 2(a)(3) of the Securities Act as amended by Section 105(a) of the JOBS Act provides that publication or distribution by a broker or dealer of a research report about an EGC that is the subject of a proposed public offering of its securities does not constitute an offer of securities, even if the broker or dealer that publishes the research is participating or will participate as an underwriter in the offering. Moreover, the term "research" is defined broadly as any information, opinion or recommendation about a company and includes oral as well as written and electronic communications.This research need not be accompanied by a full prospectus and need not provide information "reasonably sufficient upon which to base an investment decision."

Section 105(b) of the JOBS Act also eliminated restrictions on publishing research following an IPO or around the time the IPO lockup period expires or is released. Prior to that time, under SEC and Financial Industry Regulatory Authority ("FINRA") rules, underwriters of an IPO could not publish research for 25 days after the offering (40 days if they served as a manager or co-manager), and managers or co-managers cannot publish research within 15 days prior to or after the release or expiration of the IPO lockup agreements (so-called "booster shot" reports). The JOBS Act eliminated those provisions related to an EGC. On October 11, 2012, FINRA amended its rules to conform to the requirements.

The new rules would expand the safe-harbor provisions to include research related to covered investment funds.

Supporting America's Innovators Act of 2017 (S. 444)

This bill expands a registration exemption under the Investment Company Act of 1940 for venture capital funds with less than $10,000,000 in capital contributions.

A very similar bill was passed by the House on December 5, 2016, i.e. the Supporting America's Innovators Act (H.R. 4854). The House bill would create a new small "qualifying venture capital fund" under the Investment Company Act of 1940 and increase the current registration exemption under Section 3(c)(1) of the Investment Company Act to allow for up to 250 investors in such qualifying venture capital fund. Currently Section 3(c)(1) of the Investment Company Act exempts pooled funds, such as hedge funds, from registering under the Act as long as they have fewer than 100 equity holders. Currently, there is no limit on the amount of invested capital in a fund to qualify for the 3(c)(1) exemption. H.R. 4854 would create a new class of pooled fund, called a "qualifying venture capital fund," which would be defined as any venture fund with $10 million or less of invested capital and allow up to 250 investors in such fund.

The Senate bill only includes the $10,000,000 threshold and does not refer to the number of investors in a qualifying venture capital fund.

Securities and Exchange Commission Overpayment Credit Act (S. 462)

This bill requires the SEC to give a credit to any national securities exchange or national securities association for any fees or assessments paid to the SEC within the last ten (10) years that were more than the amount such exchange or association was required to pay. The bill is strictly retroactive, providing credits for past overpayments, and does not apply to pre-bill payments.

U.S. Territories Investor Protection Act of 2017 (S. 484)

This bill amends the Investment Company Act of 1940 to terminate an exemption for companies located in Puerto Rico, the Virgin Islands or any other possession of the United States. The Investment Company Act currently exempts companies organized and having their principal place of business in Puerto Rico, the Virgin Islands or any other possession of the U.S. as long as such companies do not sell securities to any resident outside of such territory. The Act provides a 3-year safe harbor for compliance with the ability for the SEC to add an additional 3 years by passing a rule extending the time for compliance.

Encouraging Employee Ownership Act (S. 488)

This bill would raise the threshold for disclosure obligations under Rule 701 under the Securities Act from $5,000,000 to $10,000,000. In particular, under the current Rule 701, a company must provide enhanced and specifically delineated disclosures to employees where such company sells in excess of $5,000,000 to employees under a written incentive or stock option plan, in any 12-month period. A substantially similar bill passed the House in 2016 (H.R. 1675). The bill would amend the rule to increase that threshold to $10,000,000.

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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