

## Corporate Practice

# The FAST Act's Effect on Securities Regulation and Disclosure Requirements

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On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act (the "FAST Act") into law. The FAST Act includes provisions intended to modernize disclosure requirements for reporting companies generally as well as to improve access to capital for start up and Emerging Growth Companies ("EGCs").

For most issuers, the more immediate benefits (the ability to submit a summary page on Form 10-K and revisions of Regulation S-K that may eliminate duplicative, overlapping, outdated, or unnecessary provisions) will likely not be available until May or June, 2016, and thus will not be available for the upcoming filing season. Moreover, any broader revisions of Regulation S-K pursuant to the FAST Act will likely not be proposed (let alone finalized) for almost two years<sup>1</sup>. EGCs will likely gain the greatest and most immediate benefit from the FAST Act's securities law amendments. Indeed, the majority of the provisions relating to EGCs and other smaller companies were made effective immediately or will be effective within 30-45 days of enactment.

### Improving Access to Capital for Emerging Growth Companies

Amended Section 6(e)(1) of the Securities Act to permit EGCs to commence a road show 15 days following publicly filing an IPO registration statement, reducing the previous 21-day waiting period. This amendment is effective upon enactment of the FAST Act. (Section 71001 of the FAST Act)

Amended Section 6(e)(1) of the Securities Act to immediately provide a grace period to any issuer that qualified as an EGC at the time it submitted its confidential registration statement or publicly filed registration statement; even if the issuer ceases to be an EGC thereafter, it will still be treated as such until the earlier of either (1) the date the EGC consummates its IPO, or (2) one year following the date on which the company ceases to be an EGC. (Section 71002 of the FAST Act)

EGCs may omit from pre-IPO registration statements historical financial information otherwise required by Regulation S-X, including financial information of a company other than the issuer, so long as the EGC reasonably believes the information relates to a historical period that will not need to be included at the time of the contemplated offering and, prior to distribution of a preliminary prospectus, the registration statement is amended to include the financial information required by Regulation S-X as of the date of amendment. EGCs will be entitled to rely on this provision and omit the information from their S-1 or F-1 registration statements starting 30 days after enactment and the staff has suggested it will not object if EGCs apply this provision immediately. Within 30 days of enactment, the SEC must revise Forms S-1 and F-1 accordingly. (Section 71003 of the FAST Act)

### Disclosure Modernization and Simplification

Within 180 days of enactment, the SEC must issue regulations to explicitly permit issuers to submit a summary page on Form 10-K, which summary is not currently prohibited. The new summary page will be required to include cross-references (by electronic link or otherwise) to the related material contained in the Form 10-K. (Section 72001 of the FAST Act)

Within 180 days of enactment and so long as the SEC determines that no further study is necessary for each revision, the SEC is required to revise Regulation S-K to (1) further reduce or eliminate requirements of S-K as applied to EGCs, accelerated filers, smaller reporting companies, and other smaller issuers, while still providing all material information and (2) eliminate duplicative, overlapping, outdated, or unnecessary provisions of S-K generally. (Section 72002 of the FAST Act)

The SEC is required to conduct a study of Regulation S-K, in consultation with the SEC's Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies, and report to Congress on the study within 360 days and issue proposed rules within another 360 days. The study, report, and proposed rules will focus on three primary goals:

- Modernizing and simplifying Regulation S-K to reduce costs and burdens while still providing all material information;
- Emphasizing a company-by-company approach that avoids boilerplate or static requirements while preserving completeness and comparability of information across registrants; and
- Improving information delivery and presentation, including readability and navigability, and discouraging repetition and the disclosure of immaterial information. (Section 72003 of the FAST Act)

The SEC previously published a "Report on Review of Disclosure Requirements in Regulation S-K" pursuant to Section 108 of the Jumpstart Our Business Startups (JOBS) Act. That report is available at <https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>.

### **Reforming Access for Investments in Startup Enterprises:**

Section 76001 of the FAST Act codifies a non-exclusive resale exemption similar to the so called "Section 4(a)(1½) exemption" at Section 4(a)(7) of the Securities Act. Effective immediately, Section 4(a)(7), exempts from registration any resale transaction where (1) each purchaser is an accredited investor and (2) neither the seller nor any person acting on the seller's behalf engages in any form of general solicitation. That said, if the issuer is not a reporting company and is not exempt from the reporting requirements pursuant to Rule 12g3-2(b), or a foreign government eligible to register securities on Schedule B, the seller must request from the issuer and make available to the prospective purchaser the following reasonably current information:

- The issuer's exact name (as well as the name of any predecessor);
- The address of the issuer's principal place of business;
- The exact title and class of the offered security and its par or stated value;
- The capitalization of the issuer as of the end of its most current fiscal year;
- The name and address of the transfer agent or other person responsible for stock transfers;
- A statement of the nature of the issuer's business including the products or services it offers (presumed current if as of 12 months before the transaction date);
- The names of the issuer's officers and directors;
- The names of any person being paid a commission or fee in connection with the sale of the securities, such as a broker or dealer;
- The issuer's most recent GAAP (IFRS if a foreign issuer) balance sheet, profit and loss statement, and similar financial statements for the two preceding fiscal years during which the issuer has been in business. The balance sheet will be presumed reasonably current if as of a date less than 16 months before the transaction date. The profit and loss statement shall be deemed reasonably current if it is for the 12 months preceding the date of the issuer's balance sheet. If the balance sheet is not as of a date less than six months before the transaction date, however, it must be accompanied by additional statements of profit and loss for the period from the dates of such balance sheet to a date less than six months before the transaction date; and
- If the seller is an affiliate, a statement regarding the nature of the affiliation accompanied by a certification from the seller that it has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

This exemption is not available if:

- The seller is a direct or indirect subsidiary of the issuer;
- The seller or any person that would be compensated in connection with the transaction, is a bad actor under the Exchange Act or Rule 506;
- The issuer is in bankruptcy or receivership or is not engaged in business, such as a blank check, blind pool, shell company;
- The transaction involves a broker-dealer's or underwriter's unsold allotment; or

- The security that is the subject of the transaction is part of a class of securities that has not been authorized and outstanding for at least 90 days prior to the transaction date.

Securities sold in a transaction exempted under Section 4(a)(7) will be deemed to be “restricted securities” within the meaning of Rule 144 and “covered securities” under the Securities Act for purposes of preemption from state “blue sky” regulations.

### Small Company Simple Registration

Within 45 days of enactment, the SEC is required to revise Form S-1 to permit smaller reporting companies to incorporate by reference in a Registration Statement on Form S-1 Exchange Act filings made after the effectiveness of the Form S-1. (Section 84001 of the FAST Act)

<sup>1</sup>Some SEC Commissioners and Staff have indicated that the Staff is already engaged in a disclosure simplification review process. It is not clear when these revisions will be proposed or whether the FAST Act will change any process that had already begun.

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