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Corporate Alert

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If you read one thing...

- The FAST Act, signed into law on December 4, 2015, includes several provisions intended to facilitate capital formations and ease regulatory burdens for smaller companies
- The changes will make it easier for EGCs to conduct an IPO, permit forward incorporation by reference in Form S-1s filed by smaller reporting companies and simplify certain disclosure requirements under Regulation S-K
- The changes also establish a new exemption under Securities Act Section 4(a)(7) for certain private resales of securities, which is intended to facilitate the development of secondary markets in private securities

JOBS Act 2.0 – New FAST Act Legislation Signed into Law to Facilitate Capital Formation

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act (the "***FAST Act***"). While the legislation is aimed at providing long-term funding certainty for surface transportation, it includes several provisions intended to improve upon the JOBS Act by facilitating capital formation transactions and easing regulatory burdens for smaller companies.

The table and narrative discussion below summarize the relevant provisions of the FAST Act:

New Benefits	**Effective Date**
Reduces from 21 to 15 the number of days before the roadshow that an Emerging Growth Company (***EGC***) must publicly file its previously confidential Initial Public Offering (***IPO***) registration statement	Immediately
Establishes a new grace period for EGCs that lose their EGC status while in registration for their IPO	Immediately

Establishes a new exemption under Securities Act Section 4(a)(7) for certain private resales of securities by codifying much of the so-called "Section 4(a)(1½)" exemption	Immediately
Permits smaller reporting companies to use forward incorporation by reference to update information in a Form S-1 or Form F-1 after the registration statement is declared effective	SEC directed to issue new regulations within 45 days of December 4, 2015
Permits EGCs to omit from their IPO registration statements certain historical financial information otherwise required by Regulation S-X	SEC directed to issue new regulations within 30 days of December 4, 2015, but companies may take advantage of the new benefit on Day 30, even in the absence of such regulations
Permits companies to submit a "summary page" on Form 10-K	SEC directed to issue new regulations within 180 days of December 4, 2015
Securities and Exchange Commission (***SEC***) to simplify the disclosure provisions under Regulation S-K	SEC directed to issue new regulations within 180 days of December 4, 2015
SEC to submit report to Congress and propose rules on further simplifying Regulation S-K	SEC directed to submit report to Congress within 360 days of December 4, 2015, and issue proposed rules 360 days from the date of the report
Applies the Exchange Act registration thresholds under Section 12(g)(1)(B) to savings and loan holding companies	Immediately

Improving Access to Capital for Emerging Growth Companies - Title LXXI

The JOBS Act included a series of provisions intended to encourage companies with less than $1 billion in annual revenue to pursue an IPO by codifying a number of changes to the IPO process and permitting scaled-down public disclosures for a new category of issuers termed "emerging growth companies."[1]

The FAST Act improves upon and adds new accommodations for EGCs, as follows:

[1] An "EGC" is defined as an issuer (including a foreign private issuer) with total annual gross revenues of less than $1 billion during its most recently completed fiscal year and did not complete its IPO on or before December 8, 2011.

Reduced timing requirement for the initial public filing of the IPO registration statement

Currently, an EGC may submit its IPO registration statement confidentially in draft form for Staff review, provided that the initial confidential submission and all amendments are publicly filed with the SEC no later than 21 days prior to the EGC's commencement of its roadshow.

The FAST Act reduces, from 21 to 15, the number of days before a roadshow that an EGC must publicly file its confidential submissions with the SEC.

Grace period for change in EGC status

Currently, if an issuer is an EGC at the time it **publicly files** its IPO registration statement, but loses its EGC status during the SEC review process, [Securities Act Rule 401 provides that] the issuer may continue to rely on the EGC rules through the effective date of its registration statement. However, if an issuer loses its EGC status while undergoing the confidential review of its draft IPO registration statement—for example, since the initial submission date, a fiscal year has been completed with revenues of more than $1 billion—it would need to publicly file a registration statement to continue the review process and comply with current rules and regulations applicable to companies that are not EGCs.

The FAST Act provides a grace period for an issuer that held EGC status at the time it confidentially submitted or publicly filed a registration statement with the SEC, but thereafter ceases to be an EGC, by allowing the issuer to be treated as an EGC until the end of the one-year period beginning on the date it ceased to be an EGC or, if earlier, the date on which the issuer consummates its IPO.

Simplified disclosure requirements for EGCs

For some time, issuers have been frustrated by the need to include in their IPO registration statement historical financial statements and related disclosures that will not be part of the registration statement at the time the IPO is marketed and priced (i.e., such financial statements will be superseded by more recent financial statements). This often occurs when the issuer completes a fiscal year between the time it files the initial IPO registration statement and the time the IPO is marketed. This frustration is especially acute when producing the to-be-superseded historical financial statements is particularly burdensome and/or expensive.

The FAST Act permits EGCs that file an IPO registration statement (or submit a confidential draft registration statement) on Form S-1 or Form F-1 to omit Regulation S-X financial information for historical periods otherwise required as of the time of filing (or confidential submission), provided that:

- the omitted financial information relates to a historical period that the EGC reasonably believes will not be required to be included in the Form S-1 or Form F-1 at the time of the offering;
- 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 date of such amendment.

To illustrate, currently, an EGC that expects to submit a draft IPO registration statement or publicly file an IPO registration statement in January 2016 would need to include FY 2014 and 2013 audited financial statements (and interim financial statements for the nine months ended September 30). This would be the case even if the EGC intends to market and price the IPO using only FY 2015 and 2014 financial statements.

The FAST Act will enable an EGC that expects to market and price its IPO in the spring of 2016 with only FY 2015 and 2014 audited financial statements to omit its FY 2013 audited financial statements from its draft or public registration statement, so long as the registration statement is amended to include the FY 2015 audited financials before a preliminary IPO prospectus is distributed to investors.

It should be noted that the Regulation S-X financial information that may be omitted is not limited to the EGC's financial statements; that is, it appears that the EGC also could omit certain financial information of a significant target business for which financial statements are required under Rule 3-05 of Regulation S-X.

Disclosure Modernization and Simplification - Title LXXII

Summary page for Form 10-K

The FAST Act mandates that, not later than 180 days after enactment, the SEC issue regulations permitting issuers to include a "summary page" within their annual report on Form 10-K, so long as each item on the summary page includes a cross-reference (by electronic link or otherwise) to the related material in Form 10-K.

Improvement on, and study of, Regulation S-K

The FAST Act also mandates the SEC to revise Regulation S-K, not later than 180 days after enactment, in order to:

- further scale or eliminate certain requirements under Regulation S-K to reduce the burden on all public companies, except large accelerated filers, while still providing all material information to investors[2]
- eliminate provisions under Regulation S-K, for all issuers, that are duplicative, overlapping, outdated or unnecessary and that the SEC determines no further study (as discussed immediately below) to be necessary to determine their efficacy.

The SEC also is required to carry out a study on Regulation S-K (in consultation with the SEC's Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies) and report the

[2] Under Exchange Act Rule 12b-2, a "large accelerated filer" includes any issuer with a worldwide public float of $700 million or more.

study's findings to Congress in 360 days. Thereafter, the SEC must issue proposed rules within 360 days after its report to Congress. The FAST Act provides that the study's goal is to:

- determine how to modernize and simplify Regulation S-K in a manner that reduces all costs and burdens on issuers
- emphasize a company-by-company approach that eliminates boilerplate language and static requirements
- evaluate methods of information delivery and presentation that discourage repetition and the disclosure of immaterial information.

This later requirement builds upon a similar mandate in the JOBS Act, for which the Division already has submitted to Congress a Regulation S-K report.[3] Although the JOBS Act mandate focused on EGCs, the report focused on the improvement of disclosure requirements applicable to companies at all stages of development. Further, the Division's "Disclosure Effectiveness" initiative, which is focused on making improvements to, and removing repetition from, Regulation S-K and S-X, is well under way.[4]

Reforming Access for Investments in Startup Enterprises - Title LXXVI

The FAST Act establishes a new exemption for certain private resales of securities by creating new Securities Act Section 4(a)(7). While it codifies much of the so-called "Section 4(a)(1½)" exemption, new Section 4(a)(7) is best read as more limited in scope due to the requirements discussed below.[5]

Effective immediately, new Section 4(a)(7) would exempt from registration any resale transaction in the securities of any issuer (public or private, without regard to size),[6] subject to the following conditions:

- Each purchaser is an accredited investor.
- No general solicitation, by either the seller or any person acting on the seller's behalf, is utilized.
- In the case of transactions involving the securities of nonreporting issuers, such issuers (upon request of the seller) must make available to both the seller and prospective purchaser certain reasonably current information, including:

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[3] http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf

[4] http://www.sec.gov/spotlight/disclosure-effectiveness.shtml

[5] Section 4(a)(1½) is a hybrid exemption not specifically provided for in the Securities Act that has developed over time based on case law and industry practice. Section 4(a)(1½) is so named because it combines the analyses for the exemptions provided in Sections 4(a)(1) and 4(a)(2); however, it properly should be considered a subset of Section 4(a)(1). The principle or theory behind the exemption provides that transactions that would be exempt under Section 4(a)(2), if undertaken by the issuer, do not involve a "distribution" if undertaken by an affiliate of the issuer or holder of restricted securities. Accordingly, the exemption is relied upon by such persons when they are concerned that they would not be able to rely on Section 4(a)(1) in connection with a resale transaction.

[6] Although the new exemption is available for transactions in the securities of SEC-reporting or private companies, it appears that the new exemption is aimed at enhancing the liquidity of the secondary market for private company securities, thus permitting these companies to stay private longer should they choose. Private resales involving the securities of SEC-reporting companies may continue to be made under the existing Section 4(a)(1½) exemption.

  - information about the issuer (name, address, nature of business, officers and directors, and transfer agent)
  - information about the securities (title, class, par value and amount outstanding)
  - financial statements for the two preceding years prepared in accordance with U.S. GAAP or, in the case of a foreign private issuer, IFRS as issued by IASB, which must be reasonably current, as set forth below:
    - balance sheet as of a date less than 16 months before the transaction date
    - income statement for the 12 months preceding the date of the issuer's balance sheet
    - if the balance sheet is not less than six months before the transaction date, an additional income statement for the period of such balance sheet to a date less than six months before the transaction date.
- To the extent that the seller is an affiliate of the issuer, a brief statement regarding the nature of the affiliation should be accompanied by a certification by such seller that it has no reasonable grounds to believe that the issuer is in violation of securities laws or regulations.
- The securities may not be offered by the issuer or a direct or indirect subsidiary of the issuer.
- The securities must not be part of an unsold allotment to, or a subscription or participation by, an underwriter of the securities or a redistribution.
- The securities must be of a class that has been outstanding for at least 90 days prior to the date of the transaction.
- The issuer must be "engaged in business" and not be in the organizational stage, in bankruptcy or receivership, or a blank check, blind pool or shell company.

Securities acquired in reliance on Section 4(a)(7) will be deemed to be "restricted" securities under Rule 144 and "covered securities" under Securities Act Section 18(b)(4) (i.e., exempt from state blue sky laws). Certain "bad actor" disqualification provisions similar to those under the current Regulation D regime would apply to sellers and compensated intermediaries.

As with other exemptions to Securities Act Section 5, new Section 4(a)(7) exemption is not the exclusive means for establishing an exemption from registration.

Small-Company Simple Registration - Title LXXXIV

Under existing SEC regulations, only issuers eligible to use short-form registration statements on Form S-3 and Form F-3 generally can utilize forward incorporation by reference.[7] The ability to forward-incorporate by reference enables an issuer's prospectus under a registration statement to stay current

[7] Form S-8, which is available to all public companies that are current in their SEC reporting obligations, provides for forward incorporation by reference, but is limited to the offer and sale of securities issued under an employee benefit plan.

after effectiveness through the automatic inclusion of the issuer's current and future Exchange Act reports. An issuer that cannot avail itself of forward incorporation by reference must update its prospectus after effectiveness, either by means of prospectus supplements or post-effective amendments.

The FAST Act requires the SEC to revise Form S-1 within 45 days to permit smaller reporting companies[8] to automatically update information in a Form S-1 prospectus by forward incorporation of reports filed with the SEC after the registration statement is declared effective.

This change will permit smaller reporting companies to maintain "shelf" resale registration statements on Form S-1, avoiding the costs and delays associated with updates via prospectus supplements or post-effectiveness amendments. These issuers, however, will not be able to use Form S-1 for delayed primary "shelf" offerings.[9]

Exchange Act Registration Thresholds for Savings and Loan Holding Companies - Title LXXXV

Exchange Act Section 12(g)(1)(B) requires any bank or bank holding company that has total assets exceeding $10 million and a class of equity securities (other than an exempted security) held of record by at least 2,000 persons to register that class of security under the Exchange Act.

The FAST Act expands Section 12(g)(1)(B) to include "savings and loan holding companies" (as defined in Section 10 of the Home Owners' Loan Act). Savings and loan holding companies had previously been subject to the Exchange Act registration thresholds included in Section 12(g)(1)(A) of the Exchange Act, which apply generally to any entity that is not a bank or bank holding company.

[8] Under Securities Act Rule 405, a "smaller reporting company" includes any issuer with a worldwide public float of less than $75 million.

[9] Securities Act Rule 415(a)(1)(x) limits delayed primary offerings to issuers that are eligible to use Form S-3 or Form F-3.

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