
Overview of Securities Law Provisions of the FAST Act

DECEMBER 10, 2015

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act. The FAST Act, which is aimed principally at authorizing spending on highway and transit projects, includes several amendments to the Jumpstart Our Business Startups Act (JOBS Act) and other securities law provisions, some of which are effective immediately.

Amendments to JOBS Act for Emerging Growth Companies

Effective immediately upon enactment of the FAST Act:

Public filing prior to road show: Section 71001 of the FAST Act amends Section 6(e)(1) of the Securities Act of 1933 to require an emerging growth company to publicly file its IPO registration statement not later than 15 days prior to commencing its roadshow. Previously, the public filing had to be made no later than 21 days prior to commencement of the roadshow. This reduction may cause emerging growth companies (EGCs) to reevaluate the timing of activities that are commonly conducted in the period of time between the initial public filing of an IPO and the launch of the IPO's roadshow, such as obtaining lock-up agreements and questionnaires from stockholders who had not been privy to the EGC's IPO plans.

EGC grace period: Section 71002 of the FAST Act further amends Section 6(e)(1) of the Securities Act to provide a grace period for an issuer that was an EGC at the time it submitted a confidential registration statement or publicly filed a registration statement for its IPO, but ceases to be an EGC prior to completion of its IPO. In this limited circumstance, the issuer will continue to be treated as an EGC through the earlier of:

- the date on which the issuer consummates its IPO pursuant to such registration statement; or
- the end of the one-year period beginning on the date the company ceases to be an EGC.

Effective within 30 days of enactment of the FAST Act:

Omission of certain financial statements: Section 71003 of the FAST Act amends Section 102 of the JOBS Act to permit an EGC that files (or submits for confidential review) a registration statement on Form S-1 or Form F-1 to omit financial information for historical periods otherwise required by

Regulation S-X as of the time of filing (or confidential submission) of such registration statement, provided that:

- the omitted financial information relates to a historical period that the issuer reasonably believes will not be required to be included in the Form S-1 or Form F-1 at the time of the contemplated offering; and
- prior to the issuer distributing a preliminary prospectus to investors, such registration statement is amended to include all financial information required by Regulation S-X at the date of such amendment.

The SEC is required to revise the relevant instructions to Form S-1 and Form F-1 within 30 days of enactment of the FAST Act to reflect this amendment to the JOBS Act. As a result of this amendment, issuers can avoid devoting time and resources to preparing financial statements and related disclosures solely to comply with Form S-1 or Form F-1 requirements at the time of filing (or confidential submission) but that would not otherwise be required at the time of their contemplated offering.

Small Company Simple Registration

Required within 45 days of enactment of the FAST Act:

Forward incorporation by reference for Form S-1: Section 84001 of the FAST Act requires the SEC to revise Form S-1 to permit a smaller reporting company to incorporate by reference in a Form S-1 registration statement any documents that it files with the SEC after the effective date of the Form S-1. This will allow smaller reporting companies that are not eligible to register shares for resale using Form S-3 to avoid having to file post-effective amendments solely for the purpose of keeping a resale Form S-1 current.

Disclosure Modernization and Simplification

Required within 180 days of enactment of the FAST Act:

Summary page for Form 10-K: Section 72001 of the FAST Act requires the SEC to issue regulations to permit issuers to submit a summary page in their Form 10-K, but only if each item on the summary page includes a cross-reference (by electronic link or otherwise) to the related information in the Form 10-K.

Improvement of Regulation S-K: Section 72002 of the FAST Act requires the SEC to revise Regulation S-K to:

- further scale or eliminate requirements of Regulation S-K in order to reduce the burden on EGCs, accelerated filers, smaller reporting companies and other smaller issuers, while still providing all material information; and
- eliminate provisions of Regulation S-K required for all issuers that are duplicative, overlapping, outdated or unnecessary.

Required within 360 days of enactment of the FAST Act:

Study on modernization and simplification of Regulation S-K: Section 72003 of the FAST Act requires the SEC to conduct another study on Regulation S-K, this time in consultation with two committees previously established by the SEC (the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies), to:

- determine how best to modernize and simplify Regulation S-K requirements in a manner that reduces the costs and burdens on issuers, while still providing all material information to investors;
- emphasize a company-by-company disclosure approach that allows relevant and material information to be disseminated to investors without boilerplate language or static requirements; and
- evaluate alternative methods of information delivery and presentation and explore methods for discouraging repetition and the disclosure of immaterial information.

A report on this study is due to Congress within 360 days from the enactment of the FAST Act, and rules to implement the recommendation of the report are to be issued within 360 days from the issuance of the report.

In December 2013, the SEC staff completed the study of Regulation S-K required under the JOBS Act. The SEC staff has since taken steps to begin to implement reforms through its ongoing “disclosure effectiveness” project.

Reforming Access for Investments in Startup Enterprises

Effective immediately:

New resale exemption: Section 76001 of the FAST Act adds a new statutory exemption to the Securities Act for certain resales of restricted securities. New Section 4(a)(7) provides a non-exclusive exemption from registration for any resale transaction that meets the following conditions:

- each purchaser is an accredited investor;
- neither the seller nor any person acting on the seller’s behalf engages in any form of general solicitation or general advertising; and
- in the case of an issuer that is not a reporting company, is not exempt from the reporting requirements pursuant to Rule 12g3-2(b) of the Securities Exchange Act of 1934, or is not a foreign government eligible to register securities on Schedule B, the issuer provides to the seller and the prospective purchaser, upon request of the seller, the following information:
 - the issuer’s exact name (as well as the name of any predecessor);
 - the address of the issuer’s principal executive offices;
 - the exact title and class of the security, its par or stated value and the number of shares or total amount of the securities outstanding as of the end of the issuer’s most recent fiscal year;
 - the name and address of the transfer agent, corporate secretary, or other person responsible for stock transfers;
 - a statement of the nature of the issuer’s business and the products and services it

offers, which will be presumed reasonably current if the statement is as of 12 months before the transaction date;

- the names of the issuer's officers and directors;
 - the names of the broker, dealer, or agent that will be paid any commission or remuneration in connection with the transaction;
 - the issuer's most recent balance sheet and profit and loss statement and similar financial statements for the two preceding fiscal years during which the issuer has been in operation, prepared in accordance with GAAP, or in the case of a foreign private issuer, IFRS. The balance sheet will be presumed reasonably current if it is as of a date less than 16 months before the transaction and the profit and loss statement will be presumed reasonably current if it is for the 12 months preceding the date of the balance sheet. If the balance sheet is not as of a date less than six months before the transaction date, it must be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than six months before the transaction date;
 - if the seller is an affiliate of the issuer, a brief statement is required regarding the nature of the affiliation, and a certification by such seller that it has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations;
- the seller is not the issuer or a direct or indirect subsidiary of the issuer;
 - neither the seller, nor any person that has been or will be paid remuneration or a commission for their participation in connection with the transaction, would be disqualified as a bad actor under Rule 506(d)(1) of Regulation D or is subject to a statutory disqualification described under Section 3(a)(39) of the Exchange Act;
 - the issuer is not in bankruptcy or receivership and is not a blank check, blind pool or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in an acquisition of an unidentified person;
 - the transaction does not relate to an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security a redistribution; and
 - the transaction involves securities of a class that has been authorized and outstanding for at least 90 days prior the transaction date.

The securities sold in an exempted transaction 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.

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