

## Client Alert

December 7, 2015



## FAST Forward

### *A Summary of the Securities Law Provisions of the FAST Act*

On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act ("FAST Act"), which includes a number of securities law related provisions that had previously been the subject of individual bills that had received bipartisan support. Below we summarize these provisions.

#### **Amendments to, or Enhancements to, the JOBS Act**

##### *Public Filing Prior to Road Show*

Section 71001 of the FAST Act amends Section 6(e)(1) of the Securities Act of 1933 (the "Securities Act"), reducing the 21-day period to a 15-day period during which an emerging growth company, or EGC, must have publicly filed its IPO registration statement prior to commencing its road show. Many market participants supported this change, noting that given ready access to information, 15 days is a sufficient period during which the public can review and access an IPO issuer's registration statement.

##### *EGC Grace Period*

Section 71002 further amends Section 6(e)(1) of the Securities Act to provide a grace period permitting an issuer that qualified as an EGC at the time it made its first confidential submission of its IPO registration statement and subsequently during the IPO process ceases to be an EGC to continue to be treated as an EGC through the earlier of:

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

##### *Omission of Financial Statements*

Section 71003 amends Section 102 of the Jumpstart Our Business Startups Act ("JOBS Act") by requiring that within 30 days of enactment of the FAST Act the Securities and Exchange Commission (the "Commission") revise the instructions to Form S-1 and Form F-1 in order to permit, and effective 30 days after enactment of the FAST Act permits, an issuer that is filing a registration statement or submitting a registration statement for confidential review to omit financial information for historical periods that otherwise would be required by Regulation S-X at the time of filing or submission, provided that the omitted financial information will not be required to be included in the Form S-1 or F-1 at the time of the consummation of the offering, and that prior to distribution of a preliminary prospectus to investors, the registration statement includes all required financial statements.

This change may have the most significant impact on IPO costs. Often an issuer is required to devote resources to preparing financial statements and related disclosures for periods solely to comply with the form requirements, although such financial statements and related disclosures will be replaced in an amendment to the registration statement by more current financial statements.

*Exchange Act Threshold*

Section 85001 of the FAST Act remedies an inadvertent omission in the JOBS Act, which had amended the Securities Exchange Act of 1934 (the “Exchange Act”) Section 12(g) trigger for banks and bank holding companies, by modifying the Section 12(g) Exchange Act trigger for savings and loan holding companies. Now, savings and loan holding companies and banks will be treated the same, and will not be required to register under the Exchange Act unless they have, at the end of the fiscal year, at least \$10 million in assets and a class of equity securities held of record by at least 2,000 persons.

**Form 10-K and Regulation S-K**

Section 72001 of the FAST Act requires that within 180 days following enactment of the Act, the Commission issue regulations permitting issuers to submit a summary page on Form 10-K if each item identified in the summary includes a cross-reference to the relevant information.

Section 72002 requires that within 180 days following enactment of the Act, the Commission take action to revise Regulation S-K to scale or eliminate requirements to reduce the burden for EGCs, accelerated filers, smaller reporting companies and other smaller issuer and to eliminate provisions of Regulation S-K that are repetitive, outdated or otherwise unnecessary.

Section 72003 requires that the Commission undertake a study of Regulation S-K and in doing so consult with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies. Within 360 days following enactment, the Commission shall issue a report to Congress regarding its findings and detailed its recommendations for simplification of the Regulation S-K requirements and the Commission shall issue proposed rules to implement its recommendations. The Commission undertook a similar report as it was mandated to do pursuant to the JOBS Act. In recent public statements various Commissioners and members of the Staff of the Commission have noted that the Staff is already engaged in a disclosure simplification review process. It is not clear how or whether these provisions of the FAST Act would change the process that is already ongoing on disclosure simplification.

**Revisions to Form S-1**

Section 84001 of the FAST Act requires that within 45 days of enactment, the Commission revise Form S-1 to permit smaller reporting companies to incorporate by reference in a Registration Statement on Form S-1 Exchange Act filings, or “forward incorporate,” made after the effectiveness of the Form S-1. For smaller issuers that are required to use Form S-1 as a “resale shelf” this will be an important change. Currently, such issuers must file post-effective amendments for the purpose of keeping a resale shelf on Form S-1 current, which can be costly.

**A New Resale Exemption**

Section 76001 of the FAST Act incorporates the provisions of the RAISE Act, which codifies an exemption for certain resales of securities as new Section 4(a)(7). This resale exemption is similar in certain respects to the current “Section 4(a)(1-1/2) exemption” for private resales of restricted securities; however, it is limited in its scope.

The exemption will provide certainty for transactions that meet the following requirements:

- 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; and
- In the case of an issuer that is not a reporting company, exempt from the reporting requirements pursuant to Rule 12g3-2(b), or a foreign government eligible to register securities on Schedule B, at the request of the seller, the seller and a prospective purchaser obtain from the issuer reasonably current information, including:
  - 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, its par or stated value, and the current capitalization of the issuer;
  - Details for the transfer agent or other person responsible for stock transfers;
  - A statement of the nature of the issuer’s business that will be presumed current if it is as of 12 months before the transaction date;
  - The issuer’s officers and directors;

- Information about any broker, dealer or other person being paid a commission or fee in connection with the sale of the securities;
- The issuer's most recent balance sheet and profit and loss statement and similar financial statement for the two preceding fiscal years during which the issuer has been in business, prepared in accordance with GAAP or, in the case of a foreign issuer, IFRS. The balance sheet will be deemed reasonably current if it is as of a date not less than 16 months before the transaction date and the profit and loss statement shall be deemed reasonably current if it is as of a date not less than 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, 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.

The new Section 4(a)(7) exemption is not available:

- If the seller is a direct or indirect subsidiary of the issuer;
- If the seller or any person that will be compensated in connection with the transaction, such as a broker-dealer, is subject to the bad actor disqualification provisions included in Rule 506 or described under Section 3(a)(39) of the Exchange Act;
- If the issuer is blank check, blind pool, shell company, special purpose acquisition company, or in bankruptcy or receivership;
- The transaction relates to an 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.

The securities sold in a Section 4(a)(7) resale transaction will be considered "restricted securities" and "covered securities" for blue sky purposes. A transaction effected pursuant to this exemption will not be deemed to be a "distribution" under the Securities Act.

In our view, most resale transactions that are undertaken in reliance on the Section 4(a)(1-1/2) exemption are unlikely to be affected by the availability of this new Section 4(a)(7) exemption given that these generally are transactions entered into between large institutional investors and involve the securities of SEC-reporting companies, as to which current information is readily available.



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