

## FAST Act Amends JOBS Act and Creates New Private Resale Exemption

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On December 4, 2015, President **Obama** signed into law the ***Fixing America's Surface Transportation Act (FAST Act)***, which includes important securities law changes and can be found [here](#). On December 10, 2015, the staff of the SEC'S Division of Corporation Finance (Staff) issued interpretive guidance on the FAST Act's securities law changes in the form of [this announcement](#) and [two compliance and disclosure interpretations](#). The securities law provisions of the FAST Act:

- shorten (from 21 days to 15 days) the time period after an emerging growth company (EGC) publicly files its IPO registration statement before the EGC may start its IPO road show;
- provide a grace period so that an issuer that loses EGC status after confidentially submitting or publicly filing its IPO registration statement, but before completing its IPO, may continue to be treated as an EGC for up to one year or the completion of its IPO (whichever is sooner);
- allow an EGC, under certain conditions, to omit from draft IPO registration statement filings any historical financial information that the EGC reasonably believes will not be required to be included when the EGC distributes its preliminary prospectus related to its IPO;
- require the SEC to adopt revisions to Form S-1 by January 18, 2016 to allow smaller reporting companies (SRCs) to utilize "forward incorporation by reference" as currently permitted by Form S-3;
- create a new registration exemption under the Securities Act of 1933 (Securities Act) for

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private resales by non-issuers to accredited investors that in some respects codifies the informal resale exemption often referred to as the “Section 4(a)(1½) exemption;”

- adjust the SEC registration and “going dark” shareholder numerical thresholds for savings and loan holding companies to match those that the JOBS Act applied to banks and bank holding companies;
- require the SEC to adopt regulations by June 1, 2016 permitting issuers to include a summary page in their Form 10-Ks; and
- require the SEC to revise Regulation S-K by June 1, 2016 to modernize and simplify disclosure requirements.

These securities law provisions:

- **will further reduce an EGC’s IPO compliance burden** by giving it the ability to omit prior-year financial data that may be within the “look back” period at initial submission/filing, but would not be at the planned completion of the IPO;
- **may promote more private resales of securities**, especially of private company securities, as non-issuer sellers now have another clearly defined method to sell beyond, for example, Securities Act Rule 144 or the less formal guidance with respect to the “Section 4(a)(1½) exemption” that has developed over time;
- **will reduce the costs and administrative burdens** of using a resale shelf registration statement for SRCs where Form S-3 is not available, as those SRCs will no longer have to regularly file post-effective amendments or prospectus supplements to keep a Form S-1 resale shelf compliant, which could make private placements more attractive to smaller issuers that are not Form S-3 eligible; and
- **may accelerate the SEC’s previously announced disclosure reform project** and, once the SEC makes the required changes to its disclosure requirements, should simplify, scale and, in some cases, eliminate certain disclosure requirements.

Although the SEC rulemaking mandates under the FAST Act are not as voluminous as under the JOBS Act, some of the mandated deadlines are aggressive, especially when considering the SEC’s outstanding Dodd-Frank rulemaking agenda and statutory requirements for public review and comment on proposed regulations. If the SEC’s Dodd-Frank and JOBS Act rulemaking process is any guide, the SEC may not meet some or all of the mandated rulemaking deadlines, thereby further delaying an issuer’s ability to take advantage of certain aspects of the FAST Act. However, issuers’ ability to utilize certain of the key FAST Act provisions — in particular the extended deadline for a public IPO filing before the road show, the ability of an EGC to omit historical financial data that would not be required at the anticipated IPO completion and the new private resale exemption — need not wait for SEC regulatory action.

The remainder of this client alert provides additional detail on the FAST Act’s securities-related provisions and the Staff’s interpretive guidance.

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## JOBS Act Amendments

**Extended deadline for publicly filing initial IPO registration statement (Section 71001).** The JOBS Act allows EGCs to submit to the SEC a draft IPO registration statement and related amendments for confidential, non-public review, if the initial submission and all amendments are publicly filed with the SEC at least 21 days prior to the start of the IPO road show. Effective immediately, the 21-day advance public filing requirement is reduced to 15 days. Consistent with the Staff's JOBS Act guidance, if an EGC does not conduct an IPO road show, the non-public drafts must be publicly filed with the SEC at least 15 days before the effectiveness of its IPO registration statement. EGCs with pending IPOs on or after December 4, 2015 may take advantage of this provision.

**Grace period following loss of EGC status (Section 71002).** Following enactment of the JOBS Act, the Staff provided guidance on what would happen if an issuer loses EGC status after confidentially submitting or publicly filing its IPO registration statement.<sup>1</sup> Effective immediately, an issuer that is an EGC when it confidentially submits or publicly files its IPO registration statement, but loses that status during the SEC review process, will continue to be treated as an EGC until the earlier of (1) the date it consummates its IPO pursuant to that registration statement or (2) one year after EGC status is lost. The Staff noted that EGCs with IPO registration statements pending on December 4, 2015 may rely on this provision.

The FAST Act changes and replaces the Staff's prior position, under which an issuer that lost EGC status between its initial confidential submission and initial public filing would not have been eligible for EGC treatment with respect to its public filing or the later IPO. However, certain post-IPO accommodations available to EGCs would continue to be unavailable, even with the new grace period, for issuers that lose EGC status during their IPO process.

**Omitting certain required historical financial information (Section 71003).** The SEC must revise its Form S-1 and Form F-1 registration statements to allow an EGC that confidentially submits or publicly files such a registration statement prior to its IPO to omit historical financial information otherwise required by Regulation S-X (including the two-year EGC "look back" for audited financials) at the time of filing or submission if:

- the omitted historical financial information is for a period that the EGC reasonably believes will not be required to be included in the registration statement at the time of the contemplated offering; and
- the EGC amends the registration statement prior to distributing a preliminary prospectus to investors to include all financial information required by Regulation S-X on the date of the amendment.

Although the FAST Act provides that the SEC has until January 3, 2016 to revise its forms and that EGCs could not rely on this provision until that date, the Staff indicated that it will not object if EGCs rely on this provision immediately.

As a result, EGCs may immediately avoid preparing and filing financial information that would fall out of the look back period during the SEC review process of their Form S-1 or F-1 IPO registration statements. However, the Staff noted that an EGC could not omit interim financial statements for a period that has financial information that will be included within required financial statements covering

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a longer interim or annual period at the time of the offering. For example, a calendar year-end EGC that submits or files an IPO registration statement in December 2015 and reasonably expects to commence its offering in April 2016 when annual financial statements for 2015 and 2014 will be required may omit 2013 annual financial statements from the December filing. However, the EGC may not omit its nine-month 2014 and 2015 interim financial statements because those statements include financial information that relates to annual financial statements that will be required at the time of the offering. For many issuers, this provision could smooth the process of starting SEC review for an IPO planned later in a subsequent fiscal year.

The Staff further indicated that an EGC may omit financial statements of other entities (for example, financial statements of an acquired business required by Rule 3-05 of Regulation S-X) from its IPO filing or submission if it reasonably believes that those financial statements will not be required at the time of the offering. This situation could arise when an EGC amends its registration statement to include its 2015 annual financial statements and, after that amendment, the acquired business has been part of the EGCs financial statements for enough time that Regulation S-X no longer requires separate financial statements for the acquired business.

***Increased SEC registration and “going dark” thresholds for savings and loan holding companies (Section 85001).*** Under the JOBS Act, the number of shareholders of record that trigger public company reporting requirements under the Securities Exchange Act of 1934 (Exchange Act) for banks and bank holding companies with total assets exceeding \$10 million was increased from 500 to 2,000. In addition, the threshold for terminating public company reporting requirements (generally referred to as “going dark”) for banks and bank holding companies was increased from 300 to 1,200 shareholders of record.

Effectively immediately, these increased thresholds also apply to a savings and loan holding company (as defined in Section 10 of the Home Owner’s Loan Act). The Staff is evaluating the effect of this provision on the SEC’s proposal to amend its rules adopted under the Exchange Act to, among other things, reflect the JOBS Act’s increased registration and “going dark” thresholds for banks and bank holding companies and also apply those increased thresholds to savings and loan holding companies.<sup>2</sup>

## **Private Resale Exemption for Non-Issuers (Section 76001)**

Effective immediately, new Securities Act Section 4(a)(7) exempts from registration a securities offering where:

- the offering is made by someone other than the issuer of the securities or any of its subsidiaries (*i.e.*, only available for private resale transactions);
- neither the seller nor any person receiving remuneration for their participation in the offering is subject to the “bad actor” disqualification provisions under Securities Act Rule 506(d)(1) or subject to statutory disqualification under Exchange Act Section 3(a)(39);
- the issuer of the securities is (1) “engaged in business,” (2) is not in the organizational stage, bankruptcy or receivership and (3) 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 a merger or combination of the business with, or an acquisition of, an unidentified person;
- the class of security being sold has been authorized and outstanding for at least 90 days;

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- each purchaser is an accredited investor (as defined in Securities Act Rule 501(a));
  - there is no general solicitation or general advertising;
  - if the offering is of securities of an issuer that is not subject to, nor exempt from, Exchange Act reporting requirements, the seller obtains from the issuer and makes available to prospective purchasers certain reasonably current information about (1) the issuer, including a description of its business, the identity of its directors and officers and balance sheets and profit and loss statements for the prior two years, (2) the security being sold (including the total amount outstanding as of the end of the issuer's most recent fiscal year), (3) the transfer agent, (4) any broker, dealer or agent participating in the offering and (5) the seller's affiliation with the issuer where the seller is a "control person;" and
  - the securities sold are not all or part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution.

Securities sold under this new exemption will be "covered securities" and are exempt from state securities laws' registration and qualification requirements. Purchasers of securities under this exemption will receive "restricted securities" within the meaning of Securities Act Rule 144.

### **SRC Forward Incorporation by Reference in Form S-1s (Section 84001)**

By January 18, 2016, the SEC must revise Form S-1 to allow SRCs to incorporate by reference any documents that the SRC files with the SEC after the effective date of their Form S-1 (commonly referred to as "forward incorporation by reference"). Currently, issuers that must use Form S-1 to register secondary resales of securities, because the issuer or transaction requirements of Form S-3 are not satisfied, must often make technical filing updates to their Form S-1 (in the form of prospectus supplements or post-effective amendments depending on the content) or risk non-compliance of certain resales with Section 5 of the Securities Act. These filings can, in some cases, trigger SEC review and often generate legal and administrative costs above and beyond ordinary course Exchange Act reporting. These costs can be meaningful to SRCs, but the filings often do not meaningfully add to the information available to the public, including the prospective purchaser of those resold securities. The ability of SRCs that have resale Form S-1s to use forward incorporation by reference should reduce these additional costs and may lessen the practical costs to SRCs associated with losing Form S-3 eligibility.

This change will not permit Form S-1 to be used for shelf primary offerings, instead it will somewhat simplify the use of Form S-1 for shelf resale offerings. Further, it is possible that the SEC could impose conditions on the use of forward incorporation by reference in this context.

### **SEC Disclosure Modernization and Simplification**

**Form 10-K summary page (Section 72001).** By June 1, 2016, the SEC must adopt regulations to allow issuers to include a summary page in their Form 10-K if each item in the summary cross-references (by electronic link or otherwise) to the discussion of that item elsewhere in the Form 10-K. Issuers are not currently prohibited from including a summary in their Form 10-K provided the summary fairly represents the material information in the report.

**Regulation S-K improvements (Section 72002).** By June 1, 2016, the SEC must revise Regulation

S-K to (1) further scale or eliminate disclosure requirements to ease the burden on EGCs, accelerated filers, SRCs and other small issuers and (2) eliminate disclosure requirements for all issuers that are duplicative, overlapping, outdated or unnecessary.

**Regulation S-K study, report and rulemaking (Section 72003).** The SEC must conduct a study of the Regulation S-K disclosure requirements to, among other things:

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

By November 28, 2016, the SEC must issue a report to Congress containing specific and detailed recommendations resulting from the study. Within 360 days after the SEC issues this report, the SEC must issue proposed rules to implement the report’s recommendations.

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1. See SEC Division of Corporation Finance, Jumpstart Our Business Startups Act Frequently Asked Questions - Generally Applicable Questions on Title I of the JOBS Act, Question 3 (Apr. 16, 2012), available at <http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm>.

2. See Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release Nos. 33-9693; 34-73876, available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-30/pdf/2014-30136.pdf>.

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