

PUBLICATION

FAST Act Brings Holiday Cheer to Issuers

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December 28, 2015

Introduction

"Fixing America's Surface Transportation Act," also known as the FAST Act, was signed by President Obama on December 4, 2015. Although primarily aimed at authorizing spending on highway and transit projects, the FAST Act includes several provisions intended to facilitate the resale of securities, enhance certain aspects of the Jumpstart Our Business Startups Act (JOBS Act) and modernize disclosure requirements for registrants filing documents with the Securities and Exchange Commission (SEC). Overall, the accommodations provided by the FAST Act are intended to improve access to capital and reduce the issuer's costs and burdens of preparing disclosure documents, all while providing investors with information material to their investment decision.

New Resale Exemption

Effective immediately, the FAST Act amends the Securities Act of 1933, as amended (the Securities Act), by adding a new Section 4(a)(7), which is an exemption from the registration requirements of the Securities Act for certain resales of securities. The new Section 4(a)(7) exempts a resale of securities from registration if, among other things:

- Each purchaser of the securities is an "accredited investor."
- Neither the seller, nor anyone acting on their behalf, engages in general solicitation or advertising related to the sale of the securities.
- The seller is not an underwriter, the issuer of the securities or a direct or indirect subsidiary of the issuer.
- Neither the seller nor any person receiving a commission in the transaction (including a broker-dealer) is subject to a "bad actor" disqualification.
- The issuer is not a blank check, blind pool or shell company or in bankruptcy or receivership.
- The securities are of a class that has been authorized and outstanding for at least 90 days before the date of the transaction.
- The securities are not part of an unsold allotment to, or a subscription or participation by, a broker-dealer.
- In the event that the securities were issued by a non-reporting issuer, the seller makes available to the purchaser certain specified information concerning the issuer and the securities.

Section 4(a)(7) securities are considered "restricted securities" and "covered securities" for blue sky purposes.

Sellers considering sales under Rule 144 may consider selling under Section 4(a)(7) without Rule 144's volume and manner of sale limitations, although sales under Section 4(a)(7) will be "restricted securities" while securities sold under Rule 144 are unrestricted. Issuers considering sales under Rule 144A may consider selling under Section 4(a)(7) without Rule 144A's requirement to sell only to qualified institutional buyers, although Section 4(a)(7) securities must be outstanding for at least 90 days.

Amendments to the JOBS Act for Emerging Growth Companies

- **Reducing EGC Public Filing Period Prior to Road Shows:** Effective immediately, issuers pursuing initial public offerings as an emerging growth company (EGC) under the JOBS Act may now publicly file their IPO registration statements with the SEC only 15 days before a road show, a reduction from the prior rule requiring 21 days.
- **EGC Grace Period:** Effective immediately, an issuer that qualifies as an EGC at the time that it submits its confidential IPO registration statement to the SEC and subsequently ceases to qualify as an EGC may continue to avail itself of the benefits of being an EGC until the earlier of (i) the date on which the issuer consummates its IPO pursuant to that IPO registration statement, or (ii) the end of a one-year period beginning on the date the issuer ceases to be an EGC.
- **Omission of Certain EGC Financial Statements:** Effective January 3, 2016, Form S-1 and Form F-1 will be revised to permit EGCs to omit Regulation S-X financial information for historical periods otherwise required as of the time of SEC filing or confidential submission if (i) all required information is provided to investors at the time a preliminary prospectus is distributed, and (ii) the issuer reasonably believes that the omitted historical information will not be required to be included at the time of the consummation of the offering.

For example, previously, an EGC planning for a late 2016 IPO and confidentially submitting an S-1 on December 30, 2015, would be obligated to include the two full prior fiscal years of audited financial information along with interim financials (financial information as of and for (a) the year ending December 31, 2014, (b) the year ending December 31, 2013, and (c) the nine months ending September 30, 2015, assuming an issuer with a fiscal year ending on December 31), despite the fact that the issuer had no plans to consummate an IPO in 2015 or market using 2013 financials. The new rule permits the EGC to omit 2013 financials, since they would not be required for a late 2016 IPO. Note that post-FAST Act SEC guidance clarifies that interim 2015 financials cannot be omitted, as they would be included in the annual financial statements as of and for the year ending December 31, 2015. Additionally, post-FAST Act SEC guidance also specifies that an EGC is permitted to omit acquired business financial statements otherwise required by Rule 3-05 of Regulation S-X, if, at the time of the offering's consummation, the acquired business would be part of the issuer's financial statements for the requisite period of time so as to not require separate financials. This will have a beneficial impact on lead times and expenses for IPO issuers, as audits for unnecessary financial periods often delay offerings and add to the overall expense and burden of the IPO process.

Disclosure Modernization and Simplification

- **Annual Reports on Form 10-K:** By June 1, 2016, the SEC will issue regulations permitting registrants to include a summary page in their annual reports on Form 10-K, so long as each summary item contains a cross-reference to the related disclosures.
- **Disclosure Effectiveness:** By June 1, 2016, the SEC will revise Regulation S-K to (i) reduce the burden on EGCs, accelerated filers, smaller reporting companies and other smaller issuers, and (ii) eliminate duplicative, overlapping, outdated and unnecessary provisions in Regulation S-K for all issuers.

Forward Incorporation by Reference by Smaller Reporting Companies

- By January 18, 2016, the SEC is required to revise Form S-1 to permit a smaller reporting company to incorporate by reference into its Registration Statement on Form S-1 any reports that the company files after the effective date of the registration statement, rather than having to amend the registration statement after each such later filing. This will benefit smaller issuers who need to keep current an S-

1, for example, due to an outstanding resale shelf, ongoing at-the-market equity offerings or for contractual reasons.

For more information on how the FAST Act may affect your business or related matters, contact the authors of this alert or any members of the Firm's Corporate Finance and Securities Group.