

# Client Alert

Corporate Practice Group

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## FAST Act Eases Access to Capital Markets for Small Companies and Seeks Disclosure Modernization for All Reporting Companies

On December 4, 2015, President Obama signed the Fixing America's Surface Transportation (FAST) Act into law. Although primarily related to infrastructure spending in the United States, the FAST Act includes a variety of provisions which further the reforms of the Jumpstart Our Business Startups (JOBS) Act by easing access to capital for small companies and reforming disclosure requirements applicable to all public companies.<sup>1</sup>

### Reducing the Burdens of Capital Raising Activities for Small Companies

Building on the measures adopted as part of the JOBS Act, the FAST Act further reduces the burdens on emerging growth companies (EGCs) seeking to raise funding through an initial public offering (IPO) by:

- Reducing from 21 to 15 the number of days prior to its roadshow that an EGC must public disseminate all confidential, draft registration statements submitted in connection with its IPO.
- Permitting a company that qualifies as an EGC at the time it files or submits its initial registration statement to the Securities and Exchange Commission (SEC) but ceases to be an EGC thereafter, to continue to be treated as an EGC until the earlier of the time it completes its IPO and one year after it ceases to qualify as an EGC.
- Beginning January 3, 2016, permitting an EGC to omit certain historical financial information otherwise required by Regulation S-X in any registration statement on Form S-1 or F-1 filed with or submitted to the SEC prior to the company's IPO so long as (1) the omitted information relates to historical periods the company reasonably believes will no longer be required to be included in the registration statement at the time of its IPO<sup>2</sup> and (2) before distributing a preliminary prospectus to investors, the company amends the registration statement to include all financial information required by Regulation S-X as of such date.<sup>3</sup>

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The FAST Act also seeks to reduce the costs for smaller reporting companies using Form S-1 to register securities by requiring the SEC to amend Form S-1 by January 18, 2016 to permit smaller reporting companies to incorporate by reference filings made with the SEC *after* the date that a registration statement on Form S-1 filed by the company becomes effective. Currently, registration statements effective on Form S-1 only permit the incorporation by reference of filings made with the SEC *before* the date that the registration statement became effective. As a result, issuers registering securities on Form S-1 must continue to update any registration statement on Form S-1 through post-effective amendments prior to the completion of the offering of securities registered. Though the exact implementation remains subject to SEC rulemaking, this change has the potential to allow smaller reporting companies to utilize Form S-1 to quickly access the capital markets with a degree of flexibility similar to that currently enjoyed by accelerated filers and large accelerated filers registering securities offerings on Form S-3.

## **Permissibility of Certain Private Re-Sales to Accredited Investors**

The FAST Act seeks to address the potential that illiquidity in private company stock may impede private investment in growing companies by amending Section 4 of the Securities Act of 1933 (the Securities Act) to exempt from registration re-sales by stockholders (other than the issuer or a subsidiary of the issuer) meeting the following requirements:

- Each purchaser is an accredited investor, as defined in Rule 501 of Regulation D.
- Neither the selling stockholder, nor any person acting on its behalf, offers or sells securities through a general solicitation or general advertising.
- If the issuer is not a reporting company under the Securities Exchange Act of 1934 (the Exchange Act), a foreign private issuer exempt from reporting under Rule 12g3-2(b) under the Exchange Act or a foreign government, the selling stockholder and the prospective purchaser must obtain from the issuer reasonably current information relating to the issuer, its business and financial results (prepared in compliance with GAAP or IFRS but not required to be audited), and information relating to the issuer's stock outstanding and persons responsible for transferring the issuer's stock.
- Neither the selling stockholder nor any person paid a commission for participating in the offer or sale of securities for the selling stockholder is subject to any of the "bad actor" disqualifications contained in Rule 506(d)(1) of Regulation D or any of the statutory disqualifications contained in Section 3(a)(39) of the Exchange Act.
- The issuer is engaged in business, is not in the organizational stage or 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 the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person.
- The transaction does not involve an unsold allotment to, or a subscription or participation by, an underwriter, or a redistribution.
- The securities being sold are part of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

The FAST Act specifies that safe harbor provisions described above will not be the exclusive means of establishing an exemption from registration under the Securities Act, leaving open the ability of sellers to rely on other SEC

rules providing exemptions from the registration requirements of the Securities Act (such as re-sales pursuant to Rule 144 or Rule 144A) and on existing guidance and interpretations of the Section 4(a)(1 1/2) exemption from registration for private re-sales. Any securities acquired in a transaction meeting the requirements of this new exemption will be considered restricted securities for purposes of Rule 144 and exempt from state blue sky laws.

## Disclosure Modernization and Simplification for All Reporting Companies

In December 2013, the SEC completed a study undertaken pursuant to the requirements of the JOBS Act on methods of simplifying and modernizing the disclosure rules contained in Regulation S-K. The FAST Act builds on these requirements from the JOBS Act by requiring the SEC to revise Regulation S-K to do the following by June 1, 2016:

- Further scale or eliminate requirements in order to reduce the burden on EGCs, accelerated filers, smaller reporting companies and other smaller issuers, while still providing all material information to investors.
- Eliminate for all issuers duplicative, overlapping, outdated and unnecessary provisions of Regulation S-K.
- Make any further revisions that the SEC determines do not require further study to determine their efficacy prior to implementation.

The FAST Act also requires the SEC to conduct a further study of the requirements of Regulation S-K to determine how best to modernize and simplify the requirements of Regulation S-K to reduce the costs on issuers while providing all material information to investors, to emphasize a company-by-company approach that avoids boilerplate language or static requirements while preserving completeness and comparability of information between companies, and to evaluate methods of information delivery and presentation and explore methods for discouraging repetition and disclosure of immaterial information. The SEC is required to complete this study and issue a report to Congress containing specific and detailed recommendations of revisions to Regulation S-K and ways to improve the readability of disclosure documents no later than November 28, 2016, and to issue proposed rules to implement these recommendations within 360 days of reporting to Congress.

As an additional item designed to improve the accessibility of public company disclosures, the FAST Act requires the SEC to issue regulations by June 1, 2016 to permit issuers to submit a summary page on Form 10-K which includes cross-references to disclosures contained elsewhere in the Form 10-K.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."*

<sup>1</sup> The provisions of the FAST Act regarding capital formation and disclosure modernization were originally adopted as stand-alone bills by the U.S. House of Representatives in July and October of 2015 prior to being included as amendments to the FAST Act.

<sup>2</sup> On December 10, 2015, the SEC provided guidance that financial information for interim periods occurring within an interim or annual period that will be required to be included in the registration statement at the time of the IPO are considered "related" thereto, and therefore must be included in a registration statement filed with or submitted to the SEC (*e.g.*, nine month financial statements must be included even when the company knows it will not complete its IPO before completing a year-end audit).

<sup>3</sup> The FAST Act separately requires the SEC to amend Forms S-1 and F-1 within 30 days following enactment of the FAST Act to implement this additional flexibility and permits issuers to rely on the ability to omit financial information.