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FAST Act Legislation Eases Capital Raising Restrictions And Seeks To Simplify Disclosure Requirements

In December 2015, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act). Buried in the hundreds of unrelated pages of the FAST Act are several provisions that modify the previously adopted Jumpstart Our Business Startups Act (JOBS Act). The FAST Act impacts capital raising for emerging growth companies (EGCs), seeks to simplify disclosure requirements for reporting companies, codifies a previously informal exemption from registration for resales of securities and streamlines the registration process for smaller reporting companies. The key securities provisions of the FAST Act are summarized below.

NEW RULES BENEFITTING EGCS

- Under the JOBS Act, an EGC is permitted to confidentially submit a draft registration statement for SEC review, provided that the draft registration statement is publicly filed with the SEC no later than 21 calendar days before the EGC commences its "roadshow." The FAST Act reduces this period from 21 days to 15 days, allowing EGCs to potentially price their public securities offerings more quickly.
- The FAST Act amends the JOBS Act by requiring that, within 30 days of the enactment of the FAST Act, the SEC revise the instructions to Form S-1 and Form F-1 in order to permit a company 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 such omitted financial information will not be required to be included in the Form S-1 or Form 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 amendment can save companies significant time and money by eliminating the need to prepare financial statements that they know will become stale and will have no use to investors.

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- The FAST Act amends the Securities Act to allow a company that was an EGC at the time it submitted or filed its registration statement for SEC review but ceased to be an EGC thereafter to continue to be treated as an EGC for limited purposes until the earlier of completing its IPO under that registration statement or one year after it ceased to be an EGC. This gives companies more time to make the necessary adjustments to their internal controls and disclosure practices.

SMALLER REPORTING COMPANY INCORPORATION BY REFERENCE

The FAST Act requires the SEC, within 45 days after the enactment of the FAST Act, to revise Form S-1 to permit any smaller reporting company to incorporate by reference in a Form S-1 any documents that the company files with the SEC after the effective date of its registration statement. Under current rules, for ongoing offerings or resale registrations, a company that is not eligible to use Form S-3 must continually amend or supplement its Form S-1 registration statement. This amendment will provide for automatic updates through periodic reports filed by the company, thus eliminating the time and effort to prepare mostly duplicative separate filings that formerly were needed to update Form S-1.

NEW RESALE EXEMPTION

The FAST Act adds a new Section 4(a)(7) to the Securities Act, which is an exemption for resales of securities to accredited investors. Section 4(a)(7) provides a statutory exemption from registration for certain resales that had previously been exempt under the less formal but well-established so-called "Section 4(a)(1½)" exemption. Section 4(a)(1½) attempts to combine an exemption for companies issuing securities in private placements with an exemption for resales of restricted securities by persons other than companies, underwriters or dealers. While widely used for resales by affiliates of companies or resales by accredited investors that have not held the securities for a long enough period to qualify for other exemptions, the Section 4(a)(1½) exemption is not technically part of the Securities Act. The new Section 4(a)(7) codifies Section 4(a)(1½) exemption, albeit with several conditions, giving those who rely on it greater comfort as to the validity of the exemption.

This provision exempts from registration secondary transactions that meet the following requirements:

- Each purchaser is an accredited investor;
- Neither the seller, nor any person acting on seller's behalf, engages in any form of general solicitation; and
- In the case of a company that is not a reporting company, the seller and a prospective purchaser designated by the seller obtain from the company certain information, including the company's name, principal place of business, title and class of the security being offered and the current capitalization of the company, transfer agent details, a statement of the company's current business and products, the company's directors and officers, information regarding brokers and dealers, the company's most recent balance sheet and profit and loss statement and similar financial statements for the two prior fiscal years prepared in accordance with GAAP, and if the seller is an affiliate of the company, 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 company is in violation of the securities law.

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

- The seller is a direct or indirect subsidiary of the company;
- The company or anyone paid a commission for participation is subject to the "bad actor" provisions included in Rule 506 of the Securities Act;
- The company is at an organizational stage, in bankruptcy, or is a blank check, blind pool or shell company;
- The transaction relates to a broker-dealer's or underwriter's unsold over-allotment; or
- The class of securities has not been authorized and outstanding for at least 90 days.

Securities sold pursuant to a Section 4(a)(7) resale transaction will be considered "restricted securities" under Rule 144 and "covered securities" for blue sky purposes. A sale made pursuant to this exemption will not be deemed to be a "distribution" under the Securities Act.

SIMPLIFIED DISCLOSURE REQUIREMENTS UNDER FORM 10-K AND REGULATION S-K

The FAST Act also seeks to simplify disclosure requirements under Regulation S-K and Form 10-K, including:

- Requiring the SEC, within 180 days after enactment of the FAST Act, to revise Regulation S-K to scale or eliminate requirements to reduce the burden on EGCs, accelerated filers and smaller reporting companies and to eliminate duplicative, overlapping, outdated or unnecessary requirements for all companies, while still providing all material information to investors. The FAST Act also requires the SEC to conduct a study on Regulation S-K and eventually to enact related rules to (1) determine how best to modernize and simplify Regulation S-K to reduce costs and burdens while still providing all material information, (2) emphasize a company-by-company approach that avoids boilerplate or static requirements while preserving completeness and comparability of information access across companies, and (3) evaluate methods of information delivery and presentation and explore methods for discouraging repetition and the disclosure of immaterial information. The SEC staff was already undertaking a review of Regulations S-K and S-X with the goal of this type of simplification, so these changes essentially accelerate that process.
- Requiring the SEC, within 180 days after the enactment of the FAST Act, to issue regulations permitting companies to submit a Form 10-K summary page, but only if each item on the summary page includes a cross-reference (by electronic link or otherwise) to the related material in the Form 10-K. Companies may already currently go beyond the letter of the disclosure rules to provide additional information, and this change does not appear on its face to mandate any new disclosure, merely to permit it.

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To obtain further information about the FAST Act, other SEC rules, private placements, or securities offerings generally, please contact the lawyer at ZAG-S&W with whom you regularly consult, or any of the lawyers listed above.