

Client Update

The “FAST” Act: Additional EGC Flexibility and Roadmap for Reform of Regulation S-K

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On December 4, 2015, President Obama signed into law the Fixing America’s Surface Transportation Act, or the “FAST” Act. While mainly focused on funding U.S. transportation and infrastructure, Titles LXXI and LXXII of the FAST Act include provisions that build upon the 2012 Jumpstart Our Business Startups Act (the “JOBS Act”) and that are intended to: (i) improve access to public capital markets for “emerging growth companies” (“EGCs”)¹; and (ii) improve, modernize and simplify public company disclosure requirements under Regulation S-K.

IMPROVED EGC ACCESS TO PUBLIC CAPITAL MARKETS

Title LXXI of the FAST Act makes three key changes to improve EGC access to public capital markets.

First, the FAST Act amends Section 6(e)(1) of the Securities Act of 1933 (the “Securities Act”) to require that an EGC publicly file a confidentially submitted IPO registration statement (including all amendments) 15 days before the date on which the issuer conducts a road show (as opposed to the previously mandated 21 days). In support of this change, the Report of the House Committee on Financial Services from July 14, 2015 (the “July House Committee Report”) notes: “[The current] 21-day period is excessively long given the ready online access the public now possesses to such filings. The volatility in our markets can narrow the window of opportunity for an IPO to launch and price successfully and a 21-day quiet period inordinately and unnecessarily restricts an EGC’s ability to come to market in a timely manner.”

¹ Generally, a company with less than \$1 billion in annual gross revenues during its most recently completed fiscal year.

Second, the FAST Act further amends Section 6(e)(1) of the Securities Act such that if an issuer was an EGC at the time it first filed or submitted an IPO registration statement, but ceases to be an EGC prior to consummation of its IPO, it will be treated as an EGC until the earlier of the date of consummation of the IPO pursuant to such registration statement or the end of the one-year period from the date on which the company ceases to be an EGC.

Finally, effective 30 days after enactment of the FAST Act, an EGC may omit certain required historical financial information in an IPO registration statement (whether confidentially submitted or publicly filed with the SEC) if the EGC “reasonably believes” that it will not be required to include the information for a given historical period at the time of the “contemplated offering.” Prior to distributing a preliminary prospectus to investors, however, the EGC must amend its registration statement to include all historical financial information required at the time of such amendment. An EGC must currently include two (and may include three) years of audited financial statements when it submits a registration statement for SEC review. This additional flexibility is meant to address situations in which the SEC review process is likely to extend through a financial statement staleness date.

In describing the intent of Title LXXI of the FAST Act, the July House Committee Report notes that these reforms are “a reaction to the success of Title I of the JOBS Act and . . . make IPOs even more appealing to small issuers.” Further, the July House Committee Report notes that these changes will create “greater optionality for issuers without altering the ultimate level of required disclosure to investors.”

DISCLOSURE MODERNIZATION AND SIMPLIFICATION

Title LXXII of the FAST Act includes three mandates on the SEC intended to reduce the burdens of disclosure on registrants.

“Summary Page” Submission on Form 10-K.

The SEC is directed to issue regulations to permit issuers to “submit a summary page on [F]orm 10-K,” provided that each item on the summary page includes a cross-reference to the relevant material contained in the Form 10-K. The Report of the House Committee on Financial Services from October 6, 2015 (the “October House Committee Report”) notes that “the typical 10-K filed by an issuer is hundreds of pages long” and that a “summary page would . . . enable investors to more easily access the most relevant information about a company.” Finally, the October House Committee Report notes that “[p]ermitting issuers to submit a summary page would enable companies to concisely disclose

pertinent information to investors without exposing them to liability.” The text of the FAST Act and its legislative history leave questions for the SEC to resolve by regulation with respect to the format, timing and other details of the new Form 10-K summary page. The SEC has 180 days following enactment of the FAST Act to address these questions.

Improvement of Regulation S-K.

Within 180 days after enactment of the FAST Act, the SEC must revise Regulation S-K in order to: (i) further scale or eliminate disclosure requirements for EGCs, accelerated filers, smaller reporting companies and other smaller issuers in order to reduce the burden on such companies while still providing all material information to investors; and (ii) eliminate duplicative, overlapping, outdated or unnecessary provisions of Regulation S-K. This mandate, paired with the mandate noted below, formalizes currently ongoing SEC disclosure reform efforts.

Study on Modernization and Simplification of Regulation S-K.

The SEC is also directed to: (i) undertake a study on how best to modernize and simplify the disclosure requirements of Regulation S-K; (ii) issue to Congress a report on such findings and recommendations; and (iii) commence rulemaking to implement such recommendations. Specifically, FAST Act Section 72003 requires the SEC to:

- within 360 days of enactment of the Fast Act, undertake a study to:
 - (a) determine how best to modernize and simplify the requirements of Regulation S-K in order to reduce the costs and burdens on issuers; (b) emphasize a company-by-company approach that prioritizes material and complete disclosure that is comparable across registrants over “boilerplate language or static requirements” and; (c) evaluate the methods of disseminating and presenting information and explore methods for discouraging repetitive and immaterial disclosure;
- within 360 days of enactment, issue a report to Congress on the findings of the above study, including specific and detailed recommendations on how to modernize and simplify the requirements of Regulation S-K, improve the readability and navigability of disclosure documents, and discourage repetition and disclosure of immaterial information; and
- within 360 days following the date of the above report, issue a proposed rule to implement the recommendations of the report.

The October House Committee Report provides additional context for the provisions of Title LXXII: “[The FAST Act] builds on Section 108 of the [JOBS Act], which directed the SEC to study Regulation S-K in order to simplify and modernize disclosure rules. Although the SEC completed this study in December 2013, the study proposed few substantive reform measures. Because the SEC has failed to move quickly in modernizing Regulation S-K, Congress must encourage the SEC to take up these needed reforms through legislation.”

CONCLUSION

While changes under FAST Act Title LXXI to EGC access to capital markets are effective upon enactment of the Act (or very shortly thereafter), the exact nature of changes to improve, modernize and simplify disclosure requirements pursuant to FAST Act Title LXXII will remain uncertain pending completion of the SEC’s review and ultimate rulemaking process as mandated by Congress.

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Please do not hesitate to contact us with any questions.