

FAST Act - Capital Markets Provisions

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On December 4, President Obama signed a \$305 billion transportation bill, referred to as the FAST Act, into law. While primarily a transportation bill, the FAST Act includes a number of key capital markets provisions aimed at enhancing the JOBS Act by facilitating access to the capital markets for emerging growth companies (EGCs) and smaller reporting companies. These provisions appear under “Division G—Financial Services” of the FAST Act and are highlighted as follows:

Improving Access to Capital for Emerging Growth Companies

- Reduces the number of days that an EGC must publicly file a registration statement with the SEC before any roadshow from 21 to 15 days.
- Allows any issuer that qualified as an EGC at the time of initially filing (or confidentially submitting) its registration statement to be treated as an EGC until the earlier of the completion of its IPO pursuant to the original registration statement or one year from the time it ceased to qualify as an EGC.
- Permits any EGC that files or confidentially submits a registration statement on Form S-1 or F-1 to omit certain financial information that would be required by Regulation S-X at the time of filing or confidential submission if, and only if, (i) such financial information relates to a historical period that the EGC reasonably believes will not be required to be included in the EGC’s registration statement at the time of the consummation of the offering and (ii) the EGC subsequently amends its registration statement to include all financial information required by Regulation S-X as of the date of such amendment. EGCs may avail themselves of this provision 30 days following enactment of the FAST Act.

The FAST Act also aims to facilitate EGC capital formation by modifying, reducing, or eliminating certain disclosure requirements imposed by Regulation S-K, in a manner to be determined through consultation with the SEC.

Reforming Access for Investments in Startup Enterprises

The FAST Act codifies the informal resale exemption from registration often called the “4(1½)” exemption under new Section 4(a)(7) of the Securities Act. This exemption, which until now had been recognized by the SEC but never codified in law or regulation, covers certain private, secondary transactions by non-issuers. The new Section 4(a)(7) provides a formal exemption from Section 5 registration provided the following requirements are met:

- Each purchaser must be an accredited investor;
- The seller and any person acting on its behalf must not offer or sell the securities in question by means of general solicitation;
- If the issuer of the securities in question is a non-reporting company, the seller and purchaser may request from the issuer, and the issuer must provide in response, certain current information relating to, among other things, the issuer and its business, the securities being sold, the issuer's officers and directors, and the issuer's financial statements prepared in accordance with U.S. GAAP;
- The issuer must be "engaged in business" and must not be in the organizational stage or in bankruptcy, and must not be a blank check, blind pool or shell company;
- The sale must not involve an unsold allotment to, or a subscription or participation by, any underwriter;
- The securities sold must be of a class that has been authorized and outstanding for at least 90 days prior to the sale; and
- Neither the issuer nor anyone paid a commission by the issuer may be a "bad actor".

Securities sold pursuant to the Section 4(a)(7) exemption are deemed to be restricted securities under Rule 144 and, as covered securities, are also exempt from registration under state "blue sky" laws.

Small Company Simple Registration

The SEC is required to amend Form S-1 to permit smaller reporting companies to automatically update filings on Form S-1 with documents incorporated by reference to filings made with the SEC by the company after its Form S-1 is declared effective. Prior to enactment of the FAST Act, incorporation by reference to future filings was permitted only in registration statements on Form S-3.

The full text of the FAST Act may be found [here](#).