

How the FAST Act Will Impact Securities Laws

Written by Paul Bork

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On December 4, 2015, the Fixing America's Surface Transportation Act (the FAST Act) was signed into law. Although the majority of the Act concerns transportation and infrastructure, it also contains several provisions that affect securities laws. These provisions include (1) amendments to the initial public offering (IPO) process established under the JOBS Act for emerging growth companies (EGCs), (2) a new statutory exemption for the private resale of securities by shareholders, and (3) requirements for the Securities and Exchange Commission to streamline and improve disclosure requirements.

Facilitating the IPO Process for EGCs

The FAST Act amended the IPO process for an EGC in three areas:

- **Grace Period during SEC Review Process.** The SEC is required to treat an issuer as an EGC (less than \$1 billion in annual revenue) while it reviews the issuer's registration statement even if the issuer ceases to be an EGC after it submits confidentially or files a registration statement. The issuer will continue to be treated as an EGC until (1) the issuer's completed IPO under the relevant registration statement or (2) one year after the issuer loses its EGC status. This amendment, effective upon enactment, will provide EGCs with more certainty as they navigate the IPO process.
- **Simplified Financial Disclosures.** An EGC is now allowed to omit historical financial information if the EGC "reasonably believes" that financial information for a given historical period will not be included in the issuer's registration statement at the time the IPO is expected to go on the road. Previously, an EGC had to provide the SEC with two years of audited financial statements, even if the financial information would not ultimately be included in the registration statement. The issuer must later amend the registration statement to include all then required financial statements before distributing a preliminary prospectus.
- **Road Shows.** Effective on enactment, an EGC is allowed to commence road shows within 15 calendar days of publicly filing the registration statement with the SEC. Previously, an EGC faced a 21 calendar day waiting period.

Private Resales by Shareholders

Until now, the Securities Act of 1933 did not contain a statutory exemption covering the private resale of securities by shareholders. Most shareholders relied on a body of SEC guidance and case law, known colloquially as the "Section 4(a)(1½) exemption."

As a result of the FAST Act, shareholders have a nonexclusive statutory safe harbor, new Section 4(a)(7) of the Securities Act, which essentially codifies the principal elements of Section 4(a)(1½).

The exemption is available to a selling shareholder if:

- the purchaser is an accredited investor;
- the seller, or anyone acting on the seller's behalf, does not use any general solicitation or advertising;
- the seller is not the issuer or a subsidiary of the issuer;
- the seller is not a "bad actor" under Regulation D;
- the issuer is "engaged in business" (i.e., no longer in the organizational stage or in bankruptcy);

- the seller does not engage an underwriter; and
- the securities are of a class that has been outstanding for over 90 days.

After the sale, the securities will be considered “restricted securities” under Rule 144, which means the securities cannot be transferred except pursuant to an effective registration statement or another exemption under the Securities Act. The securities are considered “covered securities” under the Securities Act, which will make the securities exempt from substantive aspects of state “blue sky” regulation.

Simplifying Disclosure Requirements

The FAST Act requires the SEC to streamline and simplify disclosure:

- **Form S-1 Forward Incorporation by Reference for Smaller Reporting Companies.** The SEC is directed to revise Form S-1 in order to allow a “smaller reporting company” to automatically incorporate by reference filings made by an issuer after the effective date of the shelf registration statement. A “smaller reporting company” is an issuer with a public float of less than \$75 million on the last business day of its most recently completed second fiscal quarter.
- **Form 10-K Summary Pages.** The SEC is required to issue rules that will allow all issuers to include a summary page in their annual reports. Each item in the summary must contain a cross-reference to material elsewhere in the Form 10-K.
- **Regulation S-K Improvements and Study.** The SEC is required (i) to revise Regulation S-K to revise or eliminate requirements related to EGCs or smaller reporting companies and (ii) to conduct a study of Regulation S-K requirements in order to simplify disclosure requirements in the future and provide this study to Congress by the first anniversary of enactment of the FAST Act. Any modifications to Regulation S-K must follow 360 days after the report to the Congress.

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