FAST Act Improves Capital Access for Small Companies

Buried deep in the 500 pages of the *Fixing America's Surface Transportation* (FAST) *Act*, signed December 4, 2015, are several amendments to federal securities laws intended to improve small companies' access to capital markets. Changes include a new exemption for private resale of private placement securities, loosened initial public offering (IPO) requirements for emerging growth companies and a mandate to streamline SEC disclosure requirements. Some of these provisions must be implemented by SEC rulemaking or study, while others are effective immediately.

JOBS Act Amendments

The *Jumpstart Our Business Startups* (JOBS) *Act*, enacted in 2012, established a new category of issuer under the *Securities Act of 1933* (the Securities Act) and the *Securities Exchange Act of 1934*: the emerging growth company (EGC). EGCs have unique benefits, such as the ability to confidentially submit a registration statement to the SEC and include only two years of audited financial statements in initial registration statements.

The FAST Act contains three changes for EGCs, noted below. The first two amendments are effective immediately. The third amendment took effect January 3, 2016; however, in a December 10 press release, SEC's Division of Corporate Finance announced it won't object if EGCs apply this provision immediately.

- The amount of time prior to the road show that the confidential submission of an EGC's IPO registration statement must be made public is reduced from 21 days to 15 days.
- A company that qualifies as an EGC when submitting confidential registration statements to the SEC in connection with its IPO (or publicly filing its IPO registration statement) and subsequently ceases to qualify as an EGC may continue to avail itself of the benefits of the JOBS Act as an EGC. This is allowed until the earlier of the date on which the company consummates its IPO or the end of a one-year period beginning on the date the company ceases to qualify as an EGC.
- The burden for EGCs during the confidential filing review phase is eased. EGCs may omit financial information (including audited financial statements) from Form S-1 or Form F-1 for certain periods otherwise required by Regulation S-X. An EGC can take advantage of this relief as long as either of the following is true:
    - The omitted financial information relates to a historical period the company reasonably believes will not be required to be included in the Form S-1 or Form F-1 at the time of effectiveness
    - The registration statement is subsequently amended to include all required financial information

The SEC subsequently issued additional guidance on this topic. The agency clarified interim financial information relates to both the interim period and to any longer period (either interim or annual) into which it has been or will be included. For example, consider a calendar year-end EGC that submits or files a registration statement in December 2015 and reasonably expects to commence its offering in April 2016, when annual financial statements for 2015 and 2014 will be required. This issuer may omit its 2013 annual financial statements from the December filing. However, the issuer may not omit its nine-month 2014 and 2015 interim financial statements, as those statements include financial information relating to annual financial statements required at the time of the offering in April 2016.

The SEC also clarified this benefit is not limited to the issuer's financial statements. An issuer could omit financial statements of an acquired business if it reasonably believes those financial statements will not be required at the time of the offering. This could occur when an issuer updates its registration statement to include its 2015 annual financial statements prior to the offering and, after that update, the acquired business has been part of the issuer's financial statements for a sufficient amount of time to obviate the need for separate financial statements.

Allowing an EGC greater time to keep a registration statement confidential before commencing a road show should provide greater flexibility in assessing market windows for launching an IPO. The ability to omit certain historical financial statements will help reduce offering costs incurred by an EGC, eliminate unnecessary disclosures and focus SEC review on financial statements to be included in the prospectus delivered to investors.

Disclosure Modernization & Simplification

The FAST Act also directs the SEC to modernize and simplify its disclosure regime, including:

- Having the SEC issue, by June 1, 2016, rules allowing a public company to include a summary page in its annual reports on Form 10-K that includes cross-references to the related disclosure in the report
- Revising Regulation S-K to further scale or eliminate disclosure requirements for EGCs, accelerated filers, smaller reporting companies and other smaller issuers; the SEC is required to eliminate duplicative, overlapping, outdated or unnecessary Regulation S-K provisions; this also must be completed by June 1, 2016
- Requiring the SEC to further study the best approach to modernize and simplify the disclosure requirements of Regulation S-K and issue a proposed rule to implement the recommendations of the report by November 28, 2016

Private Resale of Securities

Currently, companies rely on the informal "Section 4(a)(1-1/2) exemption" from the registration requirements of the Securities Act for private resale of securities by nonissuers, *e.g.*, employees, executive officers, directors and large shareholders, that were acquired in a private placement. The FAST Act amends the Securities Act to include new Section 4(a)(7), effective immediately, to permit resale when the following requirements are satisfied:

- Each purchaser is an accredited investor
- Neither the seller nor any person acting on the seller's behalf offers or sells the securities by any form of general solicitation
- The seller and prospective purchaser obtain certain prescribed information if the securities sold are those of a nonreporting issuer
- The transaction isn't a sale of a security by the issuer or a subsidiary of the issuer
- Neither the seller nor any person that has been or will be paid for their participation in the offer or sale is a "bad actor" (as defined in Regulation D)
- 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 without a specific business plan or purpose
- The securities are not part of an unsold allotment to, or a subscription or participation by, an underwriter
- The class of securities must have been authorized and outstanding for at least 90 days before the transaction

Securities sold under new Section 4(a)(7) are "covered securities" exempt from blue sky registration and are "restricted securities" under Rule 144 under the Securities Act.

This statutory exemption for private resale of securities covers both public and private companies, broadening the base of investors willing to purchase private company stocks by making it easier for investors to dispose of the stock after purchase, even if they are affiliates of the company or have not satisfied the Rule 144 holding period requirement.

Small Company Simple Registration

The FAST Act directs the SEC to allow smaller reporting companies to incorporate, by reference in a registration statement on Form S-1, any future filings made by the smaller reporting company. This must be completed by January 18, 2016.

This amendment will benefit smaller reporting companies that use Form S-1 for resale shelf and primary minishelf offerings by eliminating the need for such companies to prepare posteffective amendments and prospectus supplements to keep their shelf registration statements current.

Holding Company Registration Threshold Equalization

This change will treat savings and loan holding companies similar to banks and bank holding companies for the purposes of registration, termination of registration or suspension of their Exchange Act reporting obligations. This provision became effective upon enactment. Prior to this change, savings and loan holding companies became subject to Exchange Act registration requirements 120 days after the last day of its first fiscal year in which the issuer had total assets in excess of $10 million and equity securities held by either 2,000 persons or 500 unaccredited investors. The amendments eliminate the unaccredited investor threshold.

BKD has prepared several papers on the JOBS Act and will continue to monitor updates. These resources are collected in the Hot Topics section of **bkd.com**. For more information, contact your BKD advisor.

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