



February 22, 2016

## **The FAST Act: Improving the Registration Process for Emerging Growth Companies**

The *Fixing America's Surface Transportation Act* (FAST Act) enacted on December 4, 2015, contains several legislative amendments that will help improve the registration process for emerging growth companies (EGCs).<sup>1</sup> For example, for an EGC that has confidentially submitted its registration statement to the U.S. Securities and Exchange Commission (SEC) for review, the FAST Act reduces the period of time that the issuer must wait before it may commence its initial public offering (IPO) road show after it publicly files its registration statement with the SEC. And to help reduce IPO costs, the FAST Act contains a long-awaited amendment enabling EGCs to omit from their preliminary registration statements certain financial information, and it mandates the SEC to review and simplify the extensive disclosure requirements in Regulation S-K.

### **Reduced Waiting Period Before the Road Show**

Under the *Jumpstart Our Business Startups Act*, an EGC may confidentially submit to the SEC a draft registration statement for review so long as that registration statement and all amendments thereto are publicly filed with the SEC no later than 21 days before the EGC commences its IPO road show. The FAST Act reduces the wait period to 15 days, from 21 days.

### **Reduced IPO Costs: Company May Omit Certain Financial Information from Initial SEC Filing or Submission**

The FAST Act allows an EGC that is filing (or confidentially submitting) a Form S-1 or Form F-1 registration statement to omit from the registration statement annual audited financial information that relates to a prior fiscal year if the issuer reasonably believes that the omitted information need not be included in the registration statement at the time of the contemplated offering. To take advantage of this potential cost-saving measure, the issuer must, prior to distributing a preliminary prospectus, amend its registration statement to include all financial information that is required under the rules at the time of amendment. The amendment should

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<sup>1</sup> An "emerging growth company" is defined as an issuer that has not completed an IPO of common equity securities prior to December 9, 2011, and that had "total annual gross revenues" of less than US\$1 billion during its most recently completed fiscal year. An issuer's EGC status terminates on the earliest of (i) the last day of the first fiscal year of the issuer during which it had total annual gross revenues of US\$1 billion or more; (ii) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the issuer's initial public offering; (iii) the date on which the issuer has issued more than US\$1 billion in non-convertible debt during the previous three-year period; and (iv) the date on which the issuer is deemed to be a "large accelerated filer" under the *Securities Exchange Act of 1934*, as amended (Exchange Act) (*i.e.*, it has a public float of at least US\$700 million and has been a reporting issuer for at least one year).

help reduce IPO costs for some issuers by eliminating the need to incur audit fees and other incremental costs associated with including audited financial statements for a prior year that will not be included in the IPO prospectus.

For example, an EGC whose a fiscal year coincides with the calendar year and is planning an IPO in 2017 after its 2016 annual audited financial statements become available may omit its 2014 annual financial statements from a registration statement that it files with (or confidentially submits to) the SEC before its 2016 annual audited financial statements become available. Prior to distributing a preliminary prospectus in 2017, the issuer will need to file an amended registration statement that includes the required 2015 and 2016 annual audited financial statements. The amendment enables the issuer in this example to avoid incurring incremental costs (that would have otherwise been incurred) to include its 2014 financial statements in the earlier version of the registration statement.

An EGC will not be able to omit from its registration statement interim financial information that will be replaced in a subsequent amended filing at the time of the offering with more recent or updated financial information covering a subsequent interim or annual period. For example, in the case of the calendar year EGC discussed above that is planning an IPO in 2017 after its 2016 annual audited financial statements become available, that issuer may not omit its nine-month 2016 interim financial statements from a prior SEC filing (or confidential submission) because those financial statements include relevant financial information relating to the 2016 fiscal year that will be covered in the issuer's 2016 annual audited financial statements, which must be included in the registration statement at the time of the offering.

### **Relief for an Issuer that Ceased to Qualify as an EGC During the SEC Review Process**

The FAST Act enacts a "grace period" for an issuer that qualified as an EGC when it initiated its IPO registration process (either by confidentially submitting or publicly filing its IPO registration statement), but subsequently ceased to qualify as an EGC. Such an issuer is now "grandfathered" as an EGC until the earlier of the consummation of its IPO and the expiration of one year after ceasing to be an EGC. This amendment will permit such an issuer to continue with the confidential review process (rather than having to prematurely publicly file its IPO registration statement to continue the review process) and comply with the rules and regulations applicable to non-EGC issuers during the review process.<sup>2</sup>

### **Forward Incorporation for Smaller Reporting Companies**

The FAST Act requires the SEC to revise the Form S-1 registration statement to permit a smaller reporting company (generally, an issuer with a public float of less than US\$75 million) to incorporate by reference into the registration statement any reports that such issuer files with

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<sup>2</sup> Prior to the FAST Act, if that issuer confidentially submitted its IPO registration statement to the SEC for review and later ceased to qualify as an EGC during the SEC review process, the issuer was required to (i) publicly file its IPO registration statement to continue the review process and (ii) comply with the rules and regulations applicable to non-EGC issuers. Only EGCs that publicly filed their IPO registration statement before they ceased to qualify as an EGC during the SEC review process could continue to rely on the EGC rules through the effective date of their registration statement.

the SEC after the effective date of such Form S-1.<sup>3</sup> This change should eliminate the additional costs and time incurred by smaller reporting companies (that are not eligible to use Form S-3 or F-3 registration statements) by enabling them to keep their registration statements on Form S-1 current for continuous offerings that commence promptly after effectiveness and continue for a period in excess of 30 days after effectiveness.<sup>4</sup>

In January 2016, the SEC approved interim final rules implementing the required changes to Form S-1. The interim final rules contain certain eligibility requirements that must be satisfied for a smaller reporting company to forward incorporate by reference.<sup>5</sup> For instance, as is the case with historical incorporation by reference, in order to utilize forward incorporation by reference, a smaller reporting company must have filed under the Exchange Act (i) an annual report for its most recently completed fiscal year and (ii) all required reports and materials during the 12 months immediately preceding filing of the Form S-1 (or such shorter period in which the smaller reporting company was required to file such reports and materials).

### **Simplified Disclosure Requirements in Registered Offerings: SEC Must Examine Regulation S-K**

By June 1, 2016, the SEC must revise Regulation S-K, the disclosure regulation for domestic issuers, to scale back or eliminate requirements in order to reduce the burden for EGCs, accelerated filers and smaller reporting companies, and to eliminate, for all issuers, provisions of Regulation S-K that are duplicative, overlapping, outdated or unnecessary. Additionally, by November 28, 2016, the SEC must conduct a study of Regulation S-K and issue a report to Congress containing detailed recommendations for simplifying the disclosure requirements under Regulation S-K. The SEC then has an additional 360 days after it issues its report to Congress to propose rules to the recommendations contained in its report.

*If you have any questions regarding the foregoing, please contact [Jeffrey Nadler](mailto:Jeffrey.Nadler@dwpv.com) (212.588.5505) or [Paul Watkins](mailto:Paul.Watkins@dwpv.com) (212.588.5547) in our New York office.*

*Davies Ward Phillips & Vineberg LLP is an integrated firm of approximately 240 lawyers with offices in Toronto, Montréal and New York. The firm focuses on business law and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its clients, regardless of borders.*

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<sup>3</sup> Under the previous rules, registration statements on Form S-1 that were declared effective could be updated only by filing post-effective amendments because forward incorporation by reference to subsequent Exchange Act filings was permitted only on short-form registration statements on Form S-3 or Form F-3.

<sup>4</sup> The revisions to Form S-1 do not affect the current requirement that issuers must conduct delayed offerings under Rule 415(a)(1)(x) according to the *Securities Act of 1933*, as amended, using Form S-3 or Form F-3.

<sup>5</sup> The SEC is soliciting comments on the interim final rules, including on whether the interim final rules should be extended to other registrants or forms. Therefore, although the FAST Act does not specifically reference the Form F-1 registration statement used by foreign private issuers, it remains to be seen whether similar revisions may be adopted for the Form F-1.