

AN ALERT FROM THE BDO NATIONAL ASSURANCE PRACTICE

BDO FLASH REPORT

SEC MATTERS



SUBJECT

FAST ACT AMENDS SEC REPORTING REQUIREMENTS

DETAILS

On December 4th, the President signed the Fixing America's Surface Transportation (FAST) Act into law.¹ While the Act is focused on providing transportation funding, certain provisions of the Act amend the securities laws. Some of the amendments are self-executing, while others require SEC rulemaking.

The amendments included in Title LXXI of the Act are intended to improve access to capital for emerging growth companies. Unless otherwise noted below, the provisions related to Title LXXI are effective immediately. These amendments:

- ▶ Reduce the number of days an EGC's confidential submissions must be made public before its IPO roadshow to 15 days. EGCs are permitted to submit an IPO registration statement confidentially for review by the SEC staff. A confidentially submitted initial registration statement and subsequent amendments were previously required to be made public 21 days prior to the IPO roadshow.
- ▶ Permit an issuer that qualifies as an EGC at the time its initial registration statement is filed or submitted to maintain its EGC status even if it is otherwise lost until the earlier of:
 - The issuer's completed initial public offering, or
 - One year after the date on which the issuer lost its EGC status.

For example, if an issuer submitted its initial registration statement as an EGC but crossed the \$1 billion revenue threshold before going effective, it would be permitted to maintain its EGC status until the earlier of the dates mentioned above.

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¹ The text of the Act is available [here](#).

- ▶ Permit an EGC to omit historical periods from its financial statements if it reasonably expects that such periods will not be included in its effective registration statement. For example, if a calendar year end EGC submits its initial registration statement in December 2015 for confidential review by the SEC staff, the SEC's rules required it to present its financial statements for the years 2013 and 2014 and the nine months ended September 30, 2014 and 2015. The FAST Act allows an EGC to omit the 2013 financial statements if it reasonably expects that the 2013 period will not be included in the effective registration statement (i.e., if the registrant in this example expects to present full year 2014 and 2015 financial statements in the registration statement when it becomes effective in 2016). While this provision officially becomes effective on December 28th, the SEC staff has indicated that it will not object if EGCs apply this provision immediately.

The SEC subsequently issued two Compliance and Disclosure Interpretations related the provision above (available [here](#) on the SEC's website). The guidance indicates an EGC:

- May omit financial statements of other entities from its filings or submissions (e.g., Rule 3-05 target financial statements) if it reasonably expects such financial statements will not be required at the time of the offering.
- May not omit interim financial statements from its filings or submissions if the interim period or longer period (interim or annual) has been or will be included in the required financial statements at the time of the offering. For example, a calendar year end EGC that expects to commence its offering in April 2016 may not omit its 2014 and 2015 nine-month interims from its filings or submissions as they relate to the annual periods that will be required at the time of the offering.

Other self-executing changes add a new exemption for secondary sales of securities that are purchased by accredited investors and revise Section 12(g) of the Exchange Act so that savings and loan holding companies are treated the same as banks and bank holding companies for purposes of registration, termination of registration or suspension of their Exchange Act reporting obligations.²

Other significant changes to securities laws included in the FAST Act which require SEC rulemaking or additional analysis will:

- ▶ Permit smaller reporting companies to forward incorporate information by reference into Form S-1. Consequently, these companies will be able to update an effective registration statement without filing an amendment. This will facilitate offerings such as secondary offerings by selling shareholders. However, it will not permit delayed shelf offerings by such issuers, because Securities Act Rule 415(a)(1)(x) requires such offerings to be registered on Form S-3 or F-3. The amendments to Form S-1 are required by January 18, 2016.
- ▶ Require the SEC to conduct a study on the disclosure requirements of Regulation S-K with a goal to modernize and simplify its requirements. The study and the Commission's corresponding recommendations are due to Congress by November 28, 2016.
- ▶ Require the SEC to revise Regulation S-K to determine how to scale or eliminate the requirements for filers other than large accelerated filers and eliminate duplicative, outdated, or unnecessary disclosures for all filers. These changes are required by June 1, 2016 unless further consideration is needed under the study mentioned above.
- ▶ Permit issuers to include a summary page on Form 10-K that cross-references to other sections in Form 10-K. Currently, a registrant is not prohibited from including a summary, but the FAST Act adds a provision which specifically allows it and requires cross-referencing. Rulemaking is required by June 1, 2016.

Further information on the FAST Act can be found [here](#) on the SEC's website.

² The JOBS Act raised the number of shareholders of record a company may have before SEC registration is required from 500 to 2,000 as long as there are less than 500 shareholders who are not accredited investors. Nonpublic banks and bank holding companies are not subject to the 500 unaccredited investor threshold. The JOBS Act also raised the number of shareholders of record a bank or bank holding company must be below in order to terminate its SEC registration from 300 to 1,200.