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SEC Issues Rules Implementing Certain Provisions Of The FAST Act

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On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act (the "FAST Act") into law, which included many capital markets/securities-related bills. The FAST Act is being dubbed the JOBS Act 2.0 by many industry insiders. The FAST Act has an aggressive rulemaking timetable and some of its provisions became effective immediately upon signing the bill into law on December 4, 2015. Accordingly there has been a steady flow of new SEC guidance, and now implementing rules.

On January 13, 2016, the SEC issued interim final rules memorializing two provisions of the FAST Act. In particular, the SEC revised the instructions to Forms S-1 and F-1 to allow the omission of historical financial information and to allow smaller reporting companies to use forward incorporation by reference to update an effective S-1. This blog summarizes these rules.

On December 10, 2015, the SEC Division of Corporate Finance addressed the FAST Act by making an announcement with guidance and issuing two new Compliance & Disclosure Interpretations (C&DI). My blog on the FAST Act and the first two C&DI on the Act can be read [HERE](#). On December 21, 2015, the SEC issued 4 additional C&DI on the FAST Act. Each of the new C&DI addresses the FAST Act's impact on Section 12(g) and Section 15(d) of the Exchange Act as related to savings and loan companies. My blog on this guidance can be read [HERE](#).

The Amendments – an Overview

Form S-1 is the general form for the registration of securities under the Securities Act of 1933, as amended (“Securities Act”) and Form F-1 is the corresponding form for foreign private issuers.

Section 71003 of the FAST Act

Section 71003 of the FAST Act allows an emerging growth company (“EGC”) that is filing a registration statement under either Form S-1 or F-1 to omit financial information for historical periods that would otherwise be required to be included, if it reasonably believes the omitted information will not be included in the final effective registration statement used in the offering, and if such final effective registration statement includes all up-to-date financial information that is required as of the offering date. This provision automatically went into effect 30 days after enactment of the FAST Act. As directed by the FAST Act, the SEC has now revised the instructions to Forms S-1 and F-1 to reflect the new law.

The Section 71003 provisions do not allow for the omission of stub period financial statements if that stub period will ultimately be included in a longer stub period or year-end audit before the registration statement goes effective. In a C&DI, the SEC clarified that the FAST Act only allows the exclusion of historical information that will no longer be included in the final effective offering. The C&DI clarifies that “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, an issuer could not omit first-quarter financial information if that first quarter will ultimately be included as part of a second- or third-quarter stub period or year-end audit.

An SEC C&DI has clarified that Section 71003 allows for the exclusion of financial statements for entities other than the issuer if those financial statements will not be included in the final effective registration statement. For example, if the EGC has acquired a business, it may omit that acquired business' historical financial information as well. In a C&DI, the SEC confirms that: "Section 71003 of the FAST Act is not by its terms limited to financial statements of the issuer. Thus, the issuer could omit financial statements of, for example, an acquired business required by Rule 3-05 of Regulation S-X if the issuer reasonably believes those financial statements will not be required at the time of the offering. This situation 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."

As a reminder, an EGC is defined as an issuer with less than \$1 billion in total annual gross revenues during its most recently completed fiscal year. If an issuer qualifies as an EGC on the first day of its fiscal year, it maintains that status until the earliest of the last day of the fiscal year of the issuer during which it has total annual gross revenues of \$1 billion or more; the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities pursuant to an effective registration statement; the date on which the issuer has, during the previous 3-year period, issued more than \$1 billion in non-convertible debt; or the date on which the issuer is deemed to be a "large accelerated filer."

Section 84001 of the FAST Act

Section 84001 of the FAST Act requires the SEC to revise Form S-1 to permit smaller reporting companies to incorporate by reference, into an effective registration statement, any documents filed by the issuer following the effective date of such registration statement. That is, Section 84001 allows forward incorporation by reference. At first, I thought this would be a significant change, as currently smaller reporting companies are specifically prohibited from incorporating by reference and must prepare and file a post-effective amendment to keep a resale “shelf” registration current, which can be expensive. However, the SEC rule release includes eligibility requirements, including a prohibition for use by penny stock issuers, which will greatly limit the use of forward incorporation by reference, significantly reducing the overall impact of this change.

As a reminder, a “smaller reporting company” is defined as an issuer that had a public float of less than \$75 million as of the last business day of its most recently completed second fiscal quarter or had annual revenues of less than \$50 million during the most recently completed fiscal year for which audited financial statements are available.

As directed by the FAST Act, the SEC has now revised Item 12 of Form S-1 to reflect the changes and to include eligibility requirements for an issuer to be able to avail itself of the new provisions. That is, there are currently eligibility requirements for an issuer to be able to use historical incorporation by reference in a Form S-1. The new rules do not alter these existing eligibility requirements and rather attach the existing eligibility requirements related to historical incorporation by reference to the ability to be able to utilize the new provisions, allowing forward incorporation by reference.

The instructions to Form S-1 include the eligibility requirements to use historical, and now forward, incorporation by reference and include:

- The company must be subject to the reporting requirements of the Exchange Act (not a voluntary filer);
- The company must have filed all reports and other materials required by the Exchange Act during the prior 12 months (or such shorter period that such company was reporting);
- The company must have filed an annual report for its most recently completed fiscal year;
- The company may not currently be, and during the past 3 years neither the company nor any of its predecessors were, (i) a blank check company; (ii) a shell company; (iii) have offered a penny stock;
- The company cannot be registering an offering for a business combination transaction; and
- The company must make its reports filed under the Exchange Act that are incorporated by reference, available on its website, and include a disclosure of such availability that it will provide such document upon request.

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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