

Client Alert

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SEC Adopts Interim Final Rules to Implement FAST Act Provisions

By David M. Lynn

On January 13, 2016, the Securities and Exchange Commission (the “SEC”) adopted interim final rules to implement Sections 71003 and 84001 of the Fixing America’s Surface Transportation Act (the “FAST Act”). The interim final rules implement revisions to Form S-1 and Form F-1 that permit an emerging growth company to omit financial information from a registration statement for certain periods, provided that all of the required information is included in the registration statement prior to distributing a preliminary prospectus, and revisions to Form S-1 and Item 512 of Regulation S-K that permit a smaller reporting company to incorporate by reference into a Form S-1 any reports or materials filed with the SEC subsequent to the effective date of the registration statement.

The interim final rules are effective upon publication in the *Federal Register*. The SEC deadline for comments on the interim final rules is 30 days following publication in the *Federal Register*.

HISTORICAL FINANCIAL STATEMENT REQUIREMENTS FOR EGCS

Section 71003 amended Section 102 of the Jumpstart Our Business Startups Act (the “JOBS Act”) to permit an emerging growth company¹ that is filing a registration statement or submitting a registration statement for confidential review to omit financial information for historical periods that otherwise would be required by Regulation S-X at the time of filing or submission, provided that the issuer reasonably believes that the omitted financial information will not be required to be included in the Form S-1 or F-1 at the time of the consummation of the offering, and that prior to distribution of a preliminary prospectus to investors, the registration statement includes all required financial statements. The SEC was directed to revise the instructions to Form S-1 and Form F-1 in order to permit this change within 30 days of enactment of the FAST Act.

¹ An “emerging growth company” is defined in Section 2(a)(19) of the Securities Act to mean 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 emerging growth company 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” (as defined in Exchange Act Rule 12b-2). Section 71002 of the FAST Act (which was effective upon enactment of the FAST Act) amends Section 6(e)(1) of the Securities Act to provide that an issuer that qualifies as an emerging growth company at the time it initiates the registration process, either by submitting a draft registration statement or by filing it publicly, but which subsequently ceases to be an emerging growth company, will continue to be treated as an emerging growth company until the earlier of the date on which the issuer consummates its initial public offering pursuant to that registration statement or the end of the 1-year period beginning on the date the company ceases to be an emerging growth company.

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The SEC has revised Form S-1 by adding General Instruction II.C., which states:

A registration statement filed (or submitted for confidential review) under Section 6 of the Securities Act (15 U.S.C. 77f) by an emerging growth company, defined in Section 2(a)(19) of the Securities Act (15 U.S.C. 77b(a)(19)), prior to an initial public offering may omit financial information for historical periods otherwise required by Regulation S-X (17 CFR Part 210) as of the time of filing (or confidential submission) of the registration statement, provided that:

1. The omitted financial information relates to a historical period that the registrant reasonably believes will not be required to be included in this Form at the time of the contemplated offering; and
2. Prior to the registrant distributing a preliminary prospectus to investors, the registration statement is amended to include all financial information required by Regulation S-X at the date of the amendment.

Similar language was adopted as General Instruction II.E. to Form F-1, which differs from the Form S-1 instruction in that it references both Regulation S-X and Item 8.A. of Form 20-F when describing the applicable financial statement requirements.

This provision of the FAST Act and the amendments adopted by the SEC will allow emerging growth companies to reduce the costs incurred in public offerings by permitting the exclusion of historical financial statements that will eventually be superseded by more recent financial statements by the time the marketing of the offering commences through the distribution of a preliminary prospectus.

In Question 2 of the SEC Staff's *Fixing America's Surface Transportation (FAST) Act Compliance and Disclosure Interpretations*, the Staff noted that an EGC may omit financial statements of other entities from its filing or submission if it reasonably believes that those financial statements will not be required at the time of the offering, therefore the relief would apply, for example, to the financial statements of an acquired business required by Rule 3-05 of Regulation S-X if the emerging growth company reasonably believes those financial statements will not be required at the time of the offering. In Question 1 of the *Fixing America's Surface Transportation (FAST) Act Compliance and Disclosure Interpretations*, that Staff noted that an emerging growth company may not omit interim financial statements from its filing or submission for a period that has financial information that will be included within required financial statements covering a longer interim or annual period at the time of the offering, even though the shorter period will not be presented separately at that time. In the Division of Corporation Finance announcement *Recently Enacted Transportation Law Includes a Number of Changes to the Federal Securities Laws*, the Division stated that the Staff would not object if EGCs apply Section 71003 immediately after enactment of the FAST Act.

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FORWARD INCORPORATION BY REFERENCE FOR EGCS

Section 84001 of the FAST Act requires that, within 45 days of enactment, the Commission revise Form S-1 to permit a smaller reporting company² to incorporate by reference in a Registration Statement on Form S-1 filings made under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), or "forward incorporate," made after the effectiveness of the Form S-1.

The SEC amended Item 12 of Form S-1 to include new paragraph (b), which states:

In addition to the incorporation by reference permitted pursuant to paragraph (a) of this Item, a smaller reporting company, as defined in Rule 405 (17 CFR 230.405), may elect to incorporate by reference information filed after the effective date of the registration statement. A smaller reporting company making this election must state in the prospectus contained in the registration statement that all documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

As a result, under the interim final rules, a smaller reporting company must meet each of the existing eligibility requirements and conditions for incorporation by reference in order to utilize the new forward incorporation by reference provisions in Form S-1. In this regard, a smaller reporting company must have filed:

- an annual report for its most recently completed fiscal year; and
- all required Exchange Act reports and materials during the 12 months immediately preceding filing of the Form S-1 (or such shorter period during which the smaller reporting company was required to file such reports and materials).

In addition, a smaller reporting company relying on the new forward incorporation by reference provision must make its incorporated Exchange Act reports and other materials readily available and accessible on a web site maintained by or for the issuer and disclose in the prospectus that such materials will be provided upon request.

Smaller reporting companies that are blank check companies, shell companies (other than business combination related shell companies) or issuers for offerings of penny stocks will not be permitted to forward incorporate by reference information into a Form S-1.

The SEC also made a conforming change to Item 512(a) of Regulation S-K to provide for forward incorporation by reference of Exchange Act reports filed or furnished after the effective date of the registration statement on Form S-1. The undertakings in Item 512(b) of Regulation S-K will also be required in Form S-1 registration statements filed by smaller reporting companies that use forward incorporation by reference.

² A "smaller reporting company" is defined in Rule 405 under the Securities Act to mean 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.

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POTENTIAL FUTURE RULEMAKING

The SEC noted in the adopting release for the interim final rules that while the amendments apply to emerging growth companies omitting financial information from Form S-1 or Form F-1 and to smaller reporting companies using forward incorporation by reference in Form S-1, the Staff will consider whether the amendments discussed in this release should be made available to a larger group of registrants, and for additional form types. The SEC notes that any future rulemaking proposal that stems from the Staff's consideration would be subject to notice and public comment.

The adopting release also solicits comments on any aspect of our interim final rules, other matters that might have an impact on the rules, and any suggestions for additional changes.

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