

## **SEC Adopts Interim Final Rules to Implement FAST Act Public Offering Provisions**

In January 2016, the Securities and Exchange Commission (“SEC”) adopted interim final rules and forms to implement certain public offering provisions of the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>1</sup> The rules, which are now effective, (i) revise Forms S-1 and F-1<sup>2</sup> to permit an emerging growth company (“EGC”)<sup>3</sup> issuer to omit financial information for certain historical periods and (ii) revise Form S-1 and Item 512(a) of Regulation S-K to permit smaller reporting companies (“SRCs”)<sup>4</sup> to forward incorporate by reference their reports filed under the Securities Exchange Act of 1934 (“Exchange Act”).<sup>5</sup>

Pursuant to Section 71003 of the FAST Act, an IPO filer near its fiscal year-end may omit the audited financial statements of its previous year(s) and instead include only financial statements from the most recently completed fiscal year (plus reviewed financial statements for any interim period), provided that (a) the omitted information relates to a historical period that the issuer reasonably believes will not be required to be included in the Form S-1 or Form F-1 filing at the time of the contemplated offering and (b) the issuer amends the registration statement prior to distributing a preliminary prospectus to include all financial information required by Regulation S-X at the date of the amendment. This simplification of disclosure requirements can shorten the time necessary to complete the initial registration statement for an IPO and reduce registration costs for EGCs.

Pursuant to Section 84001 of the FAST Act, SRC issuers<sup>6</sup> can avoid having to file either prospectus supplements or post-effective amendments to outstanding Forms S-1 when such issuers file Forms 10-K, 10-Q, and 8-K, likely resulting in reduced audit, legal, printing and delivery costs to issuers. As a result, SRCs should be able to move more quickly to raise capital when a “market window” is open. This provision may have its

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<sup>1</sup> See Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies, 81 Fed. Reg. 2743 (Jan. 19, 2016) (to be codified at 17 C.F.R. pts. 229 & 239), available at <https://www.federalregister.gov/articles/2016/01/19/2016-00872/simplification-of-disclosure-requirements-for-emerging-growth-companies-and-forward-incorporation-by>. See also Fixing America’s Surface Transportation Act, H.R. 22, 114<sup>th</sup> Cong. (2015), available at <https://www.gpo.gov/fdsys/pkg/BILLS-114hr22enr/pdf/BILLS-114hr22enr.pdf>. For a more detailed description of the FAST Act, please refer to our Firm Memorandum *FAST Act Codifies “Section 4(1½)” Resale Exemption and Modifies JOBS Act*, (Jan. 6, 2016), available at <http://www.cahill.com/publications/firm-memoranda/10130391>.

<sup>2</sup> The Form S-1 Registration Statement is used by domestic issuers to register the offer and sale of securities under the Securities Act of 1933 (the “Securities Act”) when no other form is authorized or prescribed. Form F-1 is the corresponding form used by foreign private issuers.

<sup>3</sup> An EGC 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.

<sup>4</sup> 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.

<sup>5</sup> The ability to forward incorporate by reference is conditioned on the SRC making its incorporated Exchange Act reports and other materials readily available and accessible on a web site maintained by or for the issuer and disclosing in the prospectus that such materials will be provided upon request.

<sup>6</sup> Blank check companies, shell companies (other than business combination related shell companies) and issuers for offerings of penny stocks will not be permitted to forward incorporate by reference into a Form S-1, even if they otherwise qualify as SRCs.

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greatest beneficial impact on Form S-1 issuers making continuous offerings or offerings involving resales of securities that often require repeated informational updates.<sup>7</sup>

The SEC has requested comment on whether amendments discussed in this memorandum should be made available to a larger group of registrants, including issuers that are not SRCs, and for additional form types. Such comment period expires on February 18, 2016.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com), John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).

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<sup>7</sup> For example, this would occur when an issuer is required to maintain resale registration statements due to certain registration rights covenants for a specified period of time.