



## FAST Act Legislation Impacts SEC Filing Requirements

The FAST Act requires, among other things, the SEC to amend its rules and regulations to make it easier for emerging growth companies (EGC) to conduct initial public offerings (IPO) and to modernize and simplify the disclosure requirements of Regulation S-K.<sup>1</sup>

### Key Facts

- A company that meets the definition of an EGC will be allowed to:
  - Omit in its confidential submission or filing of an IPO registration statement historical financial information that will not be required when the registration statement goes effective;
  - Keep its EGC status for a grace period of up to one year while the SEC staff reviews its IPO registration statement, even if it no longer meets the definition of an EGC; and
  - Begin its roadshow 15 days after it files its IPO registration statement.
- The SEC must reduce or eliminate Regulation S-K disclosure requirements that are duplicative, outdated, or unnecessary.
- Smaller reporting companies (SRCs) can incorporate by reference in a registration statement documents filed after the registration statement becomes effective.

### Key Impacts

Issuers will benefit from the new law because it will:

- Lower costs to conduct an IPO for EGCs; and
- Simplify disclosure requirements, including reducing repetitive disclosures.

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<sup>1</sup> Fixing America's Surface Transportation (FAST) Act became law on December 4, 2015, available at <https://www.transportation.gov/fastact>

## Improving Access to Capital for EGCs

The law requires the SEC to revise the instructions to Form S-1 and Form F-1 to allow an EGC to omit financial information when it submits a confidential submission or public filing that it reasonably believes will no longer be required by Regulation S-X at the time of the IPO. An EGC's registration statement must include all required financial statements before it can distribute a preliminary prospectus to investors.

The law also gives a grace period to an EGC that makes an initial submission or filing of its IPO registration statement, but then subsequently loses its status as an EGC before the IPO is completed. The grace period lasts for one year or until the IPO is completed, whichever is earlier.

An EGC will need to publicly file its IPO registration statement only 15 days before beginning a road show instead of 21 days as previously required.

### KPMG Observation

Omitting certain financial information could have the biggest effect on IPO costs. For example, a calendar year-end EGC planning to price an IPO in April 2016 with 2015 audited financial statements could omit 2013 audited financial statements in a registration statement submitted before February 16, 2016. An EGC no longer will have to devote resources and incur costs related to preparing financial statements that will be replaced by more current financial statements.

However, to be able to omit this information, an EGC that is planning an IPO in April 2016 must amend its registration statement to include 2015 audited financial statements before it distributes a preliminary prospectus to investors.

## SEC Staff Guidance

On December 10, 2015, the SEC staff issued a summary of the new law that highlights the specific provisions that will affect securities laws.<sup>2</sup> The SEC staff said that it will consider providing additional guidance based on the questions that it receives. The SEC staff also said that an EGC with a registration statement pending at the time the law was enacted may begin using the new grace period to retain its EGC classification while the SEC reviews its confidential registration statement. It said that it would not object if an EGC immediately began applying the provision allowing it to omit certain financial information. The SEC staff also issued Compliance and Disclosure Interpretations (C&DIs) that provided interpretations to two questions.<sup>3</sup>

<sup>2</sup> The SEC staff's announcement is available at [www.sec.gov](http://www.sec.gov).

<sup>3</sup> Compliance and Disclosure Interpretation, Fixing America's Surface Transportation (FAST) Act, available at [www.sec.gov](http://www.sec.gov).

- **Question 1** clarified that an EGC may *not* omit interim financial statements for a period that has financial information that will be included in the required financial statements that cover a longer interim or annual period, even though the shorter period will not be presented separately. The SEC staff concluded that interim financial information relates to both the interim period and to a longer period (either interim or annual) into which it has been or will be included.

The C&DI includes an example of a calendar year-end EGC that submits a registration statement in December 2015 and reasonably expects to commence its offering in April 2016 when annual financial statements for 2015 and 2014 will be required. In this situation, an EGC may omit its 2013 annual financial statements from its December filing. However, the EGC may not omit its nine-month 2014 and 2015 interim financial statements because they include financial information that relates to annual financial statements that will still be required in April 2016 when the offering occurs.

- **Question 2** clarified that omitting certain financial information is not limited to the financial statements of the EGC itself. The C&DI explains that an EGC could omit financial statements of 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 could occur when an EGC updates its registration statement before the IPO to include annual financial statements and, after that update, the acquired business has been part of the EGC's financial statements for sufficient time to eliminate the need for separate financial statements.

#### KPMG Observation

The SEC's interpretation to Question 2 is consistent with the practice of using post-acquisition audited results to reduce the number of periods for which pre-acquisition income statements are required as outlined in Section 2030.4 of the SEC Financial Reporting Manual.

## Amendments to Form 10-K and Regulation S-K

**Summary Page.** The SEC must issue regulations by June 1, 2016, to permit all public companies to submit a summary page on Form 10-K if each item identified in the summary includes a cross-reference to the relevant information.

**Disclosure Requirement Changes.** By June 1, 2016, the SEC must:

- Reduce or eliminate Regulation S-K's requirements to ease the filing requirements on EGCs, accelerated filers, SRCs, and other small issuers, while still providing all material information to investors; and
- Eliminate the provisions of Regulation S-K that are duplicative, outdated, or unnecessary.

**Report to Congress.** The law requires the SEC to study Regulation S-K to determine how to modernize and simplify its requirements without eliminating material information. The SEC also must evaluate how the financial information is presented and delivered.

The SEC must report its findings and recommendations to Congress by November 28, 2016. Then it must issue a proposed rule to implement its recommendations within a year after presenting its recommendations to Congress.

#### KPMG Observation

In December 2013, the SEC staff reported to Congress, as required by the JOBS Act, about its review of the disclosure requirements in Regulation S-K.<sup>4</sup> After the report was released, the SEC staff launched its disclosure effectiveness initiative to conduct a comprehensive review of requirements in Regulations S-K and S-X. As part of that initiative, the SEC recently asked for comments about the effectiveness of Regulation S-X financial disclosure requirements for acquired businesses, equity method investees, guarantors and issuers of guaranteed securities, and affiliates whose securities collateralize registered securities.<sup>5</sup> The SEC staff is currently considering the comments with the intent to propose rules to update the Regulation S-X requirements.

## Incorporation by Reference

The new law requires the SEC to revise Form S-1 to permit SRCs to incorporate by reference into a registration statement documents filed after the effective date of a registration statement.

#### KPMG Observation

This amendment makes using Form S-1 for secondary offerings under a shelf registration easier for SRCs. Previously, these issuers had to file post-effective amendments to keep a resale shelf on Form S-1 current.

<sup>4</sup> Report on Review of Disclosure Requirements in Regulation S-K, as Required by Section 108 of the Jumpstart Our Business Startups Act, December 2013, available at [www.sec.gov](http://www.sec.gov). See KPMG's Defining Issues No. 14-1, SEC Releases Report on Regulation S-K, available at [www.kpmg-institutes.com](http://www.kpmg-institutes.com).

<sup>5</sup> SEC's Request for Comment on Effectiveness of Financial Disclosures about Entities Other Than the Registrant, September 25, 2015, available at [www.sec.gov](http://www.sec.gov). Also see KPMG's Defining Issues No. 15-48, SEC Requests Comments on Financial Disclosures, available at [www.kpmg-institutes.com](http://www.kpmg-institutes.com).

## Other Provisions

**Registration Threshold for Savings and Loan Companies.** The new law also amends Section 12(g) of the Exchange Act of 1934 to update the registration threshold for savings and loan holding companies. Effective immediately, savings and loan holding companies will be treated in a similar manner to banks and bank holding companies for the purposes of registration, termination of registration, or suspension of their Exchange Act reporting obligations.

**Exempted Transactions.** The new law also codifies an exemption for certain resales of securities that are purchased by accredited investors, among other requirements, which is effective immediately.

**Contact us:** This is a publication of KPMG's Department of Professional Practice 212-909-5600

**Contributing authors:** Melanie F. Dolan and Andrew L. Zulauf

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