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SEC Adopts Rules Implementing FAST Act Provisions

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The interim final rules became effective on January 19, 2016. Because the rules were adopted as interim final rules, the SEC is soliciting public comments, including with respect to whether the amendments should be extended to other registrants or forms. The deadline for public comments is February 18, 2016.

Simplified Financial Statement Disclosure Requirements for EGCs

The FAST Act permits EGCs that file an IPO registration statement (or submit a confidential draft registration statement) on Form S-1 or Form F-1 to omit Regulation S-X financial information for historical periods otherwise required as of the time of filing (or confidential submission), provided that:

- the omitted financial information relates to a historical period that the EGC reasonably believes will not be required to be included in the Form S-1 or Form F-1 at the time of the offering, and
- prior to the distribution of a preliminary prospectus to investors, the registration statement is amended to include all financial information required by Regulation S-X at the date of such amendment.

Pursuant to a FAST Act mandate, the SEC has revised the instructions to Form S-1 and Form F-1 to implement the above-described change.

The FAST Act accommodation and the amendments to Form S-1 and Form F-1 will permit EGCs to avoid the costs and burdens of including historical financial statements and related disclosures in their IPO registration statement that will not be part of the registration

statement at the time the IPO is marketed and priced (i.e., such financial statements will be superseded by more recent financial statements).

EGCs should be aware that the SEC staff recently issued two Compliance and Disclosure Interpretations that clarify the scope of the FAST Act accommodation.

- Question 1 establishes that EGCs cannot use the accommodation to exclude the most recent interim period required by Regulation S-X, even if that period will be replaced with a longer interim or annual period in the final registration statement (e.g., for a January 2016 filing where an EGC expects to consummate the offering after its FY 2015 audited financial statements are available, it can omit FY 2013 but cannot omit the nine-month periods that ended on September 30, 2015 and September 30, 2014).
- Question 2 confirms that the FAST Act accommodation applies to all historical financial information required by Regulation S-X, including the financial statements of other entities. Thus, the EGC could omit financial statements of, for example, an acquired business required by Rule 3-05 of Regulation S-X if the EGC reasonably believes those financial statements will not be required at the time of the offering. This situation could occur when an EGC updates its registration statement to include its FY 2015 annual financial statements prior to the offering and, after that update, the acquired business has been part of the EGC's financial statements for a sufficient amount of time to obviate the need for separate financial statements.

Forward Incorporation by Reference in Form S-1 Registration Statements Filed by Smaller Reporting Companies

Pursuant to a FAST Act mandate, the SEC has revised Form S-1 to permit smaller reporting companies[1] to automatically update information in a Form S-1 prospectus by forward incorporation of reports filed with the SEC after the registration statement is declared effective. The SEC, however, has imposed certain eligibility requirements and conditions on the ability of smaller reporting companies to forward incorporate by reference on Form S-1.

First, as is the case with any issuer that intends to use historical (i.e., backwards) incorporation by reference on Form S-1 for documents filed before the effective date of the registration statement, a smaller reporting company that elects to forward incorporate by reference 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).

Second, a smaller reporting company making the election to forward incorporate by reference must state in the prospectus contained in the registration statement that all documents subsequently filed 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.

Third, 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 company and disclose in the prospectus that such materials will be provided upon request.

Fourth, a smaller reporting company making the election to forward incorporate by reference must include the undertaking in Item 512(b) of Regulation S-K.[2]

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 ability to forward incorporate by reference enables an issuer's prospectus under a registration statement to stay current after effectiveness through the automatic inclusion of the issuer's current and future Exchange Act reports. An issuer that cannot avail itself of forward incorporation by reference must update its prospectus after effectiveness, either by means of prospectus supplements or post-effective amendments, the latter of which are potentially subject to SEC staff review before becoming effective. The new rules will permit smaller reporting companies to more efficiently maintain registration statements for resale transactions and continuous offerings on Form S-1 by avoiding the costs and delays associated with updates via prospectus supplements or post-effective amendments. These issuers, however, will not be able to use Form S-1 for delayed primary "shelf" offerings.[3]

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[1] A "smaller reporting company," as defined by Securities Act Rule 405, is 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;
- in the case of an initial registration statement under the Securities Act or Exchange Act for shares of its common equity, had a public float of less than $75 million as of a date within 30 days of the date of the filing of the registration statement, or
- in the case of an issuer whose public float was zero, had annual revenues of less than $50 million during the most recently completed fiscal year for which audited financial statements are available.

The issuer must not be an investment company, an asset-backed issuer or a majority-owned subsidiary of a parent company that is not a smaller reporting company.

[2] Item 512(b) provides that for Securities Act liability purposes each annual report that is incorporated by reference in the registration statement is deemed to be a new registration statement related to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

[3] Issuers intending to conduct a delayed offering must still satisfy the conditions to Rule 415(a)(1)(x), which requires the issuer to be eligible to use Form S-3 or Form F-3.

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