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# FAST Act Changes for Public and Private Companies

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On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act, or FAST Act, a highway funding and transportation safety law that had a few wholly unrelated provisions tacked on at the end. Among these unrelated provisions are changes to the securities laws designed mainly but not exclusively to help smaller companies, including:

- A statutory exemption for privately conducted resales of securities;
- Measures to streamline the annual reporting process, particularly for smaller public companies, and to "modernize and simplify" disclosure requirements for all public companies; and
- Technical changes to the statutory provisions governing IPO registration statements filed by "emerging growth companies," a category of filer created by the Jumpstart Our Business Startups Act, or JOBS Act, in 2012.

## Private Resales of Securities

Of the FAST Act securities law amendments, the one with the widest potential impact is the creation of a statutory exemption for private resales of securities of both public and private companies. Supporters of new Section 4(a)(7) believe that it will broaden the base of investors willing to purchase private company stocks by making it easier for investors to dispose of the stock after purchase, even if they are affiliates of the company or have not satisfied the Rule 144 holding period.

Section 4(a)(7) permits secondary sales that meet the following requirements:

- Each purchaser must be an accredited investor;
- Neither the seller nor any person acting on the seller's behalf may engage in general solicitation;
- If the issuer is not a reporting company or subject to certain exemptions as a foreign company, the seller must provide to the prospective purchaser certain information (described below);
- The seller may not be the issuer or a direct or indirect subsidiary of the issuer;
- Neither the seller nor any broker may be a "bad actor" who would be disqualified under Rule 506(d)(1) under the Securities Act;



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- The issuer must be engaged in business (may not be in an organizational stage or in bankruptcy or receivership, and may not be a blank check or blind pool company);
- The security may not be part of an unsold allotment to an underwriter, broker or dealer; and
- The security must be part of a class that has been authorized and outstanding for at least 90 days.

The information that must be provided if the issuer is not a reporting company includes:

- The issuer's (and its predecessors') exact name; the address of its principal executive offices; and the title, class and par value of the security;
- The number of shares outstanding as of the end of the issuer's last fiscal year;
- The name of the transfer agent or other person responsible for transferring the security;
- The name of any broker who will be paid a commission;
- The issuer's most recent balance sheet and other financial statements; and
- If the seller is a control person of the issuer, a statement concerning the nature of the seller's affiliation with the issuer and a certification that the seller has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.

Securities sold under new Section 4(a)(7) are "covered securities" exempt from Blue Sky registration, but are "restricted securities" under Rule 144 under the Securities Act.

New Section 4(a)(7) of the Securities Act essentially codifies what practitioners refer to as "Rule 4(a)(1-1/2)": a frequently used but informal exemption that allows holders of restricted or control securities to sell their shares to third parties without registration, so long as they do so privately and not as part of a general distribution of the securities. Practitioners and sophisticated investors may continue to rely on the informal Rule 4(a)(1-1/2) exemption in many cases, as it is less restrictive. New Section 4(a)(7) may nonetheless make it easier to engage in private resales of securities by setting a single, relatively easy to use standard for compliance and exempting these transactions from Blue Sky registration.

## Modernization and Simplification of Disclosure for Reporting Companies

The FAST Act sets forth several requirements designed to improve public company reporting. The SEC is required to adopt regulations allowing companies to provide a summary page for the Form 10-K annual report (which would seem already to be possible). The SEC is also directed to "further scale or eliminate" provisions of Regulation S-K, the principal disclosure regulation, to reduce the burden on smaller companies while still providing all material information to investors, and to eliminate duplicative, overlapping, outdated or unnecessary requirements. Finally, the SEC is to

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undertake a study of how to modernize and simplify Regulation S-K and to evaluate methods of information delivery and presentation.

### Technical Changes for IPO Registration Statements

The FAST Act improves the IPO “on-ramp” created by the JOBS Act in a couple of ways. First, the minimum time period between the public filing of an initial registration statement by an emerging growth company and the date a road show may commence is reduced from 21 days to 15 days. Second, companies that qualify as emerging growth companies when they first file an initial registration statement are allowed to continue to make use of the accommodations afforded to emerging growth companies, even if they lose their emerging growth company status (for example if their annual revenues exceed \$1 billion), until the earlier of the consummation of the offering or one year following the date they ceased to be emerging growth companies. Finally, emerging growth companies are allowed to omit financial information from their filing or confidential submission of a registration statement if the information relates to historical periods for which coverage will not be required by the time the company’s registration statement becomes effective.

The FAST Act makes one additional change to the registration process for smaller reporting companies (regardless of whether they qualify as emerging growth companies). The FAST Act directs the SEC to revise Form S-1 to permit smaller reporting companies to incorporate by reference documents filed with the SEC after the effective date of the registration statement. This will make it easier for smaller reporting companies to maintain the effectiveness of a registration statement and thus facilitate secondary sales by company insiders or other transactions requiring a continuously effective registration statement.

### About the Author



Bonnie J. Roe is a Corporate Partner in C&G’s New York office. Her practice focuses on securities law, mergers and acquisitions, corporate governance, and private equity. Ms. Roe regularly advises public companies and their boards of directors on public disclosure, SEC compliance matters, corporate governance, and executive compensation. She has served as counsel for issuers, investors, and placement agents in connection with public and private offerings, including cross-border offerings.