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## The FAST Act: JOBS Act, Private Resales, Swaps and More

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The Fixing America's Surface Transportation (FAST) Act emerged from a House-Senate conference as the final product of negotiations on a long-term highway funding bill which itself had already morphed into a catch-all for other legislative goals, including a number of changes to the securities laws. At the FAST Act's core is a five-year, fully paid plan to broadly deal with U.S. roads and bridges, public transportation, car and truck safety, and railroads. (A [summary](#) offers a quick tour of the transport-specific provisions). Legislators also re-authorized the Export-Import Bank, one of the Act's most fiercely contested provisions. But tucked away near the end of the measure are several provisions that will likely have a significant impact on securities practice.

### Introduction

The FAST Act, now Public Law [No. 114-94](#), was [signed](#) into law by President Obama on December 4, 2015, shortly after the Senate followed the House in passing the conference report with overwhelming bipartisan support. The measure passed the House [359-65](#) and the Senate [83-16](#). "This bill is not perfect, but it is a commonsense compromise, and an important first step in the right direction," [said](#) the president.

Division G of the FAST Act sets out the several financial services provisions. Most of the securities-related items were [tacked on](#) to the House version of the highway bill by Financial Services Committee Chairman Jeb Hensarling (R-Tex). "They are modest because they are bipartisan, but they are important and can make a difference in people's lives," said the FSC chairman.

The FAST Act's securities provisions include a number of updates to the Jumpstart Our Business Startups (JOBS) Act for emerging growth companies (EGCs), a measure to spur creation of a secondary market for some privately resold securities, a mandate for the SEC to revise some of its forms and to review old rules, plus several other items, including a change to swaps laws that may enable the sharing of data between U.S. and foreign regulators.

### JOBS Act Update

The FAST Act further eases the initial public offering on-ramp for EGCs under the various additions to the securities laws made by Title I of the JOBS Act. Title LXXI contains provisions set out in the Improving Access to Capital for Emerging Growth Companies Act ([H.R. 2064](#)), co-sponsored by Rep. Stephen Fincher (R-Tenn) and John Delaney (D-Md). The bill cleared the FSC 57-0 and passed the House by voice vote.

FAST Act Section 71001 amends Securities Act Section 6(e)(1) by shortening the number of days before a road show that an EGC must publicly file its confidential draft registration statement and any amendments from 21 to 15 days. Section 71002 likewise amends Securities Act Section 6(e)(1) by clarifying that a company that was an EGC when it submitted a confidential draft registration statement for SEC staff review (or a publicly filed registration statement) retains its EGC status until the earlier of its IPO under “such” registration statement, or until one year after the company was no longer an EGC.

Section 71003 of the FAST Act amends JOBS Act Section 102 to ease some EGC disclosure obligations. Specifically, the SEC must amend the general instructions to Forms S-1 and F-1 to provide that an EGC’s registration statement, prior to its IPO, can omit historical financial data otherwise required by Regulation S-X, if the EGC reasonably believes the information will not be required and the EGC amends its registration to include any required information as of the date of amendment before it distributes a preliminary prospectus.

The SEC is directed to move ahead on the forms revisions within 30 days of enactment of the FAST Act. Moreover, an EGC can rely on the provision in the same time period, subject to the stated conditions.

### Private Resale of Restricted Securities

FAST Act Title LXXVI (Section 76001) amends Securities Act Section 4 to codify a provision for the private resale of some securities held by the employees of private companies that was previously allowed only under SEC guidance. The FAST Act provision derives from [H.R. 1839](#) and a [substitute version](#) of the bill offered by Rep. Patrick T. McHenry (R-NC), known as the Reforming Access for Investments in Startup Enterprises Act of 2015, and approved by the FSC by a vote of 58-0, and by the full House by a vote of 404-0.

Transactions in securities subject to the new exemption must abide by a some limits, including: (1) the buyer must be an accredited investor; (2) the seller and its agents cannot engage in general solicitation or advertising; (3) the seller and those paid to participate in the deal are not subject to bad actor disqualifications; (4) the issuer is not a blank check or other organizational- or bankruptcy-stage company; and (5) the security involved has been authorized and issued for at least 90 days.

Moreover, the seller and the prospective buyer are entitled to basic information from the issuer about its business, including who its executives are, the terms of the security and its par value, and financial data. But the transaction exemption is not available if the seller is an issuer or subsidiary of the issuer. The transaction also must not involve the unsold allotment of a broker-dealer acting as an underwriter of the security or a redistribution.

Another provision clarifies that securities acquired in these transactions do not involve any public offering, are not a distribution, and the securities are restricted securities under Securities Act Rule 144. Yet another provision deems them to be covered securities under Securities Act Section 18(b)(4). A rule of construction also clarifies that it may be possible to invoke other exemptions from the registration requirement of Securities Act Section 5.

During the markup of H.R. 1839, Rep. McHenry told FSC members that private resales are “vital for adding liquidity to the secondary markets and driving economic growth.” He explained that the existing Section 4(a)(1-1/2) regime is “inefficient” due to its reliance on court decisions and SEC no-action relief. According to the representative, his bill would strike the right balance between innovation and growth, and shareholder and investor protections. Ranking Member Maxine Waters (D-Cal) said she backed the bill and urged her fellow Democrats to give their support.

## Forms, Registrations, Old Rules

Three already-passed House bills are the foundation for several FAST Act titles that divide into four sections of the Act. These provisions deal with changes to SEC forms and registration statements and ask the SEC to do more to cull outmoded rules.

FAST Act Title LXXII enacts provisions contained in the Disclosure Modernization and Simplification Act of 2015 ([H.R. 1525](#)), sponsored by Rep. Scott Garrett (R-NJ), who ultimately [voted against](#) passage of the FAST Act because of what he called its unsustainable highway funding provisions and its re-authorization of the Export-Import Bank. The purpose of Rep. Garrett’s underlying securities bill was to push the SEC to simplify its disclosure rules, a goal that garnered unanimous approval by the FSC and House passage by voice vote.

Section 72001 of the FAST Act will let an issuer submit a summary page on Form 10-K, if each item in the summary page also includes cross-references (*e.g.*, electronic links) to related information in the issuer’s Form 10-K. The SEC is directed to issue regulations to implement the provision within 180 days after the FAST Act’s date of enactment.

Another part of Rep. Garrett’s disclosure bill targets the SEC’s Regulation S-K for streamlining. FAST Act Section 72002 incorporates these items and directs the SEC to scale Regulation S-K for EGCs and other smaller issuers while ensuring that investors still can get all material information. For all types of issuers, the SEC is directed to eliminate any duplicative or outmoded provisions in Regulation S-K. But the SEC must first determine that no additional study on the efficacy of any changes is needed under FAST Act Section 72003 (the FAST Act refers to Section 72203, but no such section exists in the Act). The SEC is directed to finish this work within 180 days of the FAST Act’s enactment.

Moreover, FAST Act Section 72003 requires the SEC to study Regulation S-K with an eye to modernization and simplification, to incorporation of a company-by-company approach to disclosures, and to examination of information-delivery methods to curb repetitious and immaterial disclosures. The SEC’s study must include consultations with the agency’s Investor Advisory Committee and its Advisory Committee on Small and Emerging Companies. The SEC also must report its findings to Congress within 360 days of the FAST Act’s enactment, and propose rules to implement its recommendations no later than 360 days after it issues the report to Congress.

Lastly, two FAST Act titles make changes to Form S-1 and Exchange Act Section 12(g). Title LXXX-IV (Section 84001) directs the SEC to revise Form S-1 to allow smaller reporting companies to

partake of forward incorporation by reference. The provision was part of the Small Company Simple Registration Act of 2015 ([H.R. 1723](#)), co-sponsored by Rep. Ann Wagner (R-Mo) and Rep. Terri A. Sewell (D-Ala), which had unanimous backing from the FSC and passed the House by a vote of 426-0. The form must be revised no later than 45 days after enactment of the FAST Act.

Title LXXXV (Section 85001) amends Exchange Act Section 12(g) to update the registration threshold for savings and loan holding companies. The revision was initially part of the Holding Company Registration Threshold Equalization Act of 2015 ([H.R. 1334](#)), sponsored by Rep. Steve Womack (R-Ark) and Rep. Wagner. The bill was unanimously approved by the FSC and won passage by the full House on a voice vote.

## Small Business Investment Companies

FAST Act Title LXXIV revises the Investment Advisers Act to clarify the treatment of advisers to small business investment companies (SBICs). The several provisions in this title derive from the SBIC Advisers Relief Act of 2015 ([H.R. 432](#)), sponsored by Rep. Blaine Luetkemeyer (R-Mo), which the FSC approved by a vote of 53-0 and the House passed by voice vote.

The bill is designed to lower regulatory costs and other burdens on advisers of SBICs. Testimony from industry participants before an FSC subcommittee noted the seeming incongruence between a Dodd-Frank Act exemption and the SEC's policy requiring advisers who advise both SBICs and venture capital funds to be registered.

Section 74001 of the FAST Act updates Advisers Act Section 203(l) to clarify that "venture capital fund" also means those entities described in three subparagraphs of Advisers Act Section 203(b)(7), such as SBIC licensees under the Small Business Investment Act of 1958, entities that may proceed to qualify under the SBA law, or entities affiliated with one or more licensed SBICs with another pending license application. But "venture capital fund" would not include entities that opt to be regulated under Investment Company Act Section 54.

Likewise, FAST Act Section 74002 amends Advisers Act Section 204(m) to ensure that entities within the scope of Section 203(b)(7)(A)-(C) are excluded from the assets under management requirement. Existing Section 204(m) spells out the exemption and reporting requirements for an adviser that solely advises private funds and has less than \$150 million in U.S. assets under management. FAST Act Section 74003 updates Advisers Act Section 203A(b) to preempt related state registration requirements.

## Swaps

Title LXXXVI of the FAST Act is one of several provisions [added](#) during the conference process. Section 86001 of the highway legislation repeals the swaps data sharing indemnification requirements contained in the Commodity Exchange Act and the Exchange Act. But the FAST Act text is similar to Section 603 in the Dodd-Frank Act corrections bill sponsored by Senate Banking Committee Chairman Richard C. Shelby (R-Ala) (more below on this bill the banking committee approved on

a partisan vote), and the Swap Data Repository and Clearinghouse Indemnification Correction Act of 2015 ([H.R. 1847](#)), sponsored by Rep. Rick Crawford (R-Ark), which the FSC approved unanimously and the House passed by voice vote.

The several amendments to the CEA and the Exchange Act clarify that the sharing of swaps and security-based swaps data with foreign regulators requires a confidentiality agreement, not an indemnity agreement. Indemnification requirements imposed by the Dodd-Frank Act had been criticized because they could hinder global regulation of swaps and result in significant legal costs. The amendments are effective as if they had been enacted by the Dodd-Frank Act.

CFTC Commissioner J. Christopher Giancarlo [praised](#) the enactment of the FAST Act and its swaps transparency provision. “The Dodd-Frank Act created the vehicle of swap data repositories to compile data on global swaps transactions providing international regulators with essential information necessary in the event of a future crisis,” said Giancarlo. “Yet, a major flaw in Dodd-Frank imposed indemnification obligations on overseas regulators in order to share this critical information, which has been preventing international data sharing for swaps transactions.”

SEC Commissioner Michael S. Piwowar [echoed](#) Giancarlo’s sentiments. Piwowar said the successful repeal of the swaps indemnification provisions showed that worries about Dodd-Frank Act roll-backs often promoted a “false narrative” that the FAST Act’s “thoughtful legislation” helps to refute.

## What’s Next?

Some of the FAST Act’s securities provisions create an ambitious rulemaking agenda for the SEC to finish in a compressed time frame as measured from the FAST Act’s date of enactment, December 4, 2015. Four of these provisions require the agency to amend forms, issue regulations, or conduct studies.

- **30 days**—The SEC must amend the general instructions to Form S-1 and Form F-1 to ease historical financial data burdens for EGCs under Regulation S-X (Section 71003).
- **45 days**—The SEC is directed to revise Form S-1 to allow some companies to use forward incorporation by reference (Section 84001).
- **180 days**—The SEC must issue regulations to allow issuers to submit Form 10-K summary pages (Section 72001). The SEC also must streamline Regulation S-K for EGCs and for all issuers (Section 72002).
- **360 days**—The SEC must report to Congress on its findings about how to streamline Regulation S-K. The SEC also must propose rules to implement its findings within 360 days after it issues the report to Congress (Section 72003).

## Conclusion

While the FAST Act made a number of mostly uncontroversial changes to existing securities laws, there remains a possibility that congressional negotiations on an omnibus spending bill may include even more far reaching changes to the Dodd-Frank Act and other securities laws. Earlier this year, the Senate added Chairman Shelby's Financial Regulatory Improvement Act of 2015 ([S. 1484](#)) to its own version of the financial regulators' spending bill ([S. 1910](#)).

Senator Sherrod Brown (D-Ohio), the banking committee's ranking member, has [criticized](#) the attempt to tie Dodd-Frank Act fixes to the funding bill. Yet Chairman Shelby has [said](#) the Dodd-Frank Act is not "untouchable," a conclusion he said even some of the reform law's early backers now admit. It remains to be seen how much, if any, of Chairman Shelby's "corrections" bill ends up in the spending measure.

A statement issued by President Obama shortly before he signed the FAST Act urged legislators to finish their work on the omnibus spending bill. "Congress should pass a complete budget and avoid a government shutdown," said the president.

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