

CLIENT MEMORANDUM

The FAST Act: A Summary of Certain Securities Laws Provisions, Including JOBS Act 2.0

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On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act or "FAST Act," which includes four capital markets-related bills incorporating capital formation-related changes to the Securities Act of 1933 (the "Securities Act"). Below is a summary of the principal provisions of the capital markets related-bills.¹

Title LXXI—Improving Access to Capital for Emerging Growth Companies

Title LXXI enacts three principal changes to the current treatment of "emerging growth companies" or "EGCs," as defined by Section 2(a)(19) of the Securities Act.

Section 71001 of the FAST Act amends Section 6(e)(1) of the Securities Act to reduce the number of days that an EGC must publicly file its IPO registration statement before beginning a road show from 21 days to 15 days.

¹ Title LXXII, the fourth capital markets-related bill, directs the SEC to issue regulations to permit issuers to include a summary page on their Form 10-K filings (provided that each item on the summary page includes a cross-reference to the relevant information). Title LXXII also charged the SEC with modernizing and simplifying the requirements of Regulation S-K with the goal of making the disclosure requirements less burdensome on issuers, while still ensuring that investors have access to material information.

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Section 71002 of the FAST Act further amends Section 6(e)(1) of the Securities Act to enact a “grace period” for an EGC that subsequently ceases to be an EGC after confidentially submitting or publicly filing its IPO registration statement. Under the newly amended Section 6(e)(1), the issuer will continue to be treated as an EGC until the earlier of: (1) the date that such issuer consummates its IPO pursuant to such registration statement and (2) the end of the one-year period beginning on the date the issuer ceases to be an EGC.

Finally, Section 71003 of the FAST Act amends the Jumpstart Our Business Startups Act (“JOBS Act”) to require that, within 30 days of the enactment of the FAST Act, the Securities and Exchange Commission (“SEC”) permit an issuer filing (or confidentially submitting) a Form S-1 or Form F-1 to omit financial information for historical periods otherwise required by Regulation S-X at the time of such filing or confidential submission provided that (1) the omitted financial information relates to a historical period that the issuer reasonably believes will not be required to be included in the Form S-1 or F-1 at the time of the offering and (2) the registration statement must include all required financial statements before the preliminary prospectus is distributed to investors. This could have a significant impact on reducing IPO costs by omitting historical financial statements for periods that would not ultimately be required at the time of the offering.

Title LXXVI—Reforming Access for Investments in Startup Enterprises

Title LXXVI codifies the so-called Section “4(a)(1½)” resale exemption, an informal case law-based exemption that is relied on for certain resale transactions without registration under the Securities Act. The newly enacted Section 4(a)(7) of the Securities Act exempts from registration resale transactions that satisfy the following conditions:

1. Each purchaser is an accredited investor;
2. No general solicitation;
3. In the case of a non-reporting issuer, the issuer must provide (at the request of the seller) to the seller and the prospective purchaser certain general and financial information about the issuer and the securities;
4. The seller cannot be the issuer or a direct or indirect subsidiary of the issuer;
5. The seller and any person that receives remuneration or commission in connection with the transfer of securities must not be disqualified under the Regulation D Rule 506(d) bad actor provisions;
6. The issuer must be engaged in business, and must not be (i) in the organizational phase, (ii) in bankruptcy or receivership, (iii) a blank check, blind pool or shell company that does not have a specific business plan or (iv) a special purpose acquisition vehicle;
7. The securities must not be part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the securities or a redistribution; and
8. The securities must be part of a class that has been authorized and outstanding for at least 90 days.

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Such resale transactions also have the benefit of a preemption of state securities or “blue sky” law registration requirements.

Title LXXXIX—Small Company Simple Registration

Title LXXXIX requires the SEC to revise the Form S-1 within 45 days of the enactment of the FAST Act to permit a smaller reporting company to incorporate by reference into its Form S-1 any reports that the company files after the effective date of the registration statement, rather than having to amend the registration statement after each such later filing. Previously, the forward incorporation of future filings was only permitted in registration statements on the Form S-3.

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