

# Client Alert

December 2015

## Key Securities Law Provisions of the FAST Act

On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act (the FAST Act) into law. The FAST Act, which is aimed at improving the country's surface transportation infrastructure, also contains a number of provisions impacting the federal securities laws and capital raising. We summarize some of the key provisions below.

### Export-Import Bank

Authorization for the US Export-Import Bank, which backs exports by US businesses through loans and loan guarantees, had lapsed. The FAST Act reauthorizes the US Export-Import Bank through 2019.

### Improving Access to Capital for Emerging Growth Companies

Emerging growth companies under the JOBS Act may now publicly file confidential submissions with the Securities and Exchange Commission (SEC) only 15 days before a roadshow, which is a reduction from the prior rule requiring 21 days. This provision is effective immediately. Additionally, an issuer that was an emerging growth company when it confidentially submitted a draft registration statement to the SEC or publicly filed for its IPO, but subsequently fell out of emerging growth company status, may continue to be treated as an emerging growth company for one year or until consummation of its IPO, whichever is earlier. This grace period is also effective immediately.

The FAST Act also provides that Form S-1 or Form F-1 registration statements for emerging growth companies may omit Regulation S-X financial information for historical periods otherwise required as of the time of filing or confidential submission if all required information is provided to investors at the time a preliminary prospectus is distributed and the registrant reasonably believes that the omitted historical information will not be required at the time of the offering. This provision is intended to reduce the cost of the IPO process by eliminating the expense associated with preparing financial statements and related disclosures that will be superseded by subsequent amendment. These changes become effective 30 days from enactment of the FAST Act.

### Disclosure Modernization and Simplification

The FAST Act establishes a number of mandates for the SEC in order to accelerate the agency's disclosure effectiveness initiative. For example, the statute requires the SEC to issue regulations within 180 days of enactment permitting issuers to include a summary page on Form 10-K that includes cross-references (by hyperlink or otherwise) to full disclosures elsewhere in the form. The current instructions to Form 10-K do not currently prohibit an issuer from using a summary page on a voluntary basis.

The FAST Act also requires the SEC, within 180 days of enactment, to revise Regulation S-K to, among other things, (1) further scale or eliminate requirements of the regulation so as to reduce the burden on emerging growth companies, accelerated filers, smaller reporting companies and other smaller issuers, and (2) eliminate provisions of Regulation S-K that are duplicative, overlapping, outdated or unnecessary. Separately, within 360 days after enactment, the SEC must conduct a study to (1) determine how best to modernize and simplify such requirements in a manner that reduces the costs and burdens on issuers while still providing all material information; (2) emphasize a company-by-company approach that allows

relevant and material information to be disseminated to investors without boilerplate language or static requirements while preserving completeness and comparability of information; and (3) evaluate methods of information delivery and presentation and explore methods for discouraging repetition and the disclosure of immaterial information. Within 360 days of delivery of the study to Congress, the SEC must then propose rules to implement the study's recommendations.

### **Reforming Access for Investments in Startup Enterprises**

The FAST Act creates a new resale exemption under Section 4(a)(7) of the Securities Act intended to codify the so-called "Section 4(a)(1½) exemption" and provide securityholders with greater ability to effect secondary market transactions. The new provision, which is effective immediately, exempts from registration any resale transaction that meets certain conditions, including, among others, participation only by accredited investors, no general solicitation or advertising, and provision of various financial information and other disclosures. Moreover, the securities must be of a class of securities that have been outstanding for more than 90 days. Issuers may not rely on the exemption, and use of new Section 4(a)(7) is subject to "bad actor" disqualifications.

Securities sold under Section 4(a)(7) will be deemed "covered securities" under the Securities Act and will therefore be exempt from certain aspects of state blue sky regulation. Securities acquired in transactions under the new Section 4(a)(7) will also be deemed "restricted securities" within the meaning of Rule 144. The FAST Act makes clear that this exemption is non-exclusive; we expect that transactions by institutional investors in securities of public companies will continue to be effected under the existing Section 4(a)(1½) mechanism.

### **Small Company Simple Registration**

The FAST Act requires the SEC, within 45 days of enactment, to permit a smaller reporting company to make use of forward incorporation by reference on Form S-1. This provision is intended to facilitate secondary resale offerings by smaller reporting companies.

### **Holding Company Registration Threshold Equalization**

The Dodd-Frank Act inadvertently excluded savings and loan holding companies from the liberalized Section 12(g) registration requirements available to banks and bank holding companies. The FAST Act corrects this mistake and provides for equal treatment of banks, bank holding companies, and savings and loan holding companies under Section 12(g). Thus, all three categories of financial institutions will not be required to register under the Securities Exchange Act unless they have, at the end of the fiscal year, at least \$10 million in assets and a class of equity securities held of record by at least 2,000 persons.

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