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December 9, 2015

## **FAST Act Adopted—Amends JOBS Act, Codifies Resale Exemption and Provides for Disclosure Simplification**

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act (the "FAST Act"). Although primarily a transportation bill, the FAST Act contains various securities law-related provisions that amend portions of the Jumpstart Our Business Startups Act (the "JOBS Act"), codify the "Section 4(a)(1½)" legal framework for resales of restricted securities by persons other than the issuer, and provide for disclosure simplification, as discussed below.

### **JOBS Act Amendments**

The FAST Act amends several provisions of the JOBS Act with the goal of simplifying and streamlining certain aspects of the registration process for emerging growth companies ("EGC's"). Specifically:

- ***Reduction in time period during which a registration statement must be publicly filed prior to the road show.*** The FAST Act amends Section 6(e)(1) of the Securities Act of 1933 (the "Securities Act") to reduce, from 21 to 15 days, the period during which an EGC must have publicly filed its registration statement prior to commencing its road show.
- ***Grace period if EGC status lost during IPO process.*** The FAST Act amends Section 6(e)(1) of the Securities Act to add a grace period that permits an issuer that was an EGC when it confidentially submitted a draft registration statement to the Securities and Exchange Commission (the "SEC") or publicly filed for its IPO, but subsequently ceases to be an EGC, to continue to be treated as an EGC for one year or until consummation of its IPO, whichever is earlier.
- ***Omission of financial information for certain earlier periods.*** The FAST Act amends Section 102 of the JOBS Act to require that, within 30 days of enactment of the FAST Act, the SEC revise Form S-1 and Form F-1 in order to permit an issuer that is filing (or confidentially submitting) such a registration statement to omit financial information for historical periods that otherwise would be required by Regulation S-X at the time of filing or submission, provided the issuer reasonably believes that the omitted financial information would not be required to be included in the registration statement at the time of the contemplated offering. The registration statement would be required to include all required financial statements prior to distribution of a preliminary prospectus to investors.

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### Codification of Section 4(a)(1½) Resale Exemption

The FAST Act adds a new Section 4(a)(7) to the Securities Act incorporating the provisions of the previously proposed RAISE Act, which codifies the “Section 4(a)(1½)” legal framework for resales of restricted securities by persons other than the issuer. The Section 4(a)(1½) resale exemption—based on case law, and not formally established by any written SEC rule or regulation—has been interpreted to permit, in certain circumstances, the resale by persons other than the issuer of restricted securities in a private placement.

Resales pursuant to Section 4(a)(7) are subject to a number of requirements, including:

- **Accredited investors only.** Purchasers of the restricted securities are required to be accredited investors.
- **Prohibition on general solicitation or advertising.** Neither the seller, nor any person acting on the seller’s behalf, is permitted to offer or sell securities by any form of general solicitation or general advertising.
- **Information requirement.** In the case of a transaction involving the securities of an issuer that is neither subject to Section 13 or 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) nor exempt from reporting pursuant to Rule 12g3-2(b) thereunder, the seller is required to make available certain information to a prospective purchaser, including the issuer’s most recent balance sheet and income statement.
- **Issuer disqualification.** The exemption is not available for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer.
- **Bad actor prohibition.** Neither the seller, nor any person paid remuneration for their participation in the offer or sale of the securities, may be subject to an event that would disqualify an issuer under Rule 506(d)(1) of Regulation D or be subject to a statutory disqualification described under Section 3(a)(39) of the Exchange Act.
- **Engaged in business.** The issuer must be “engaged in business” and may not be in the organizational stage, or in bankruptcy or receivership, and may not be a blank check, blind pool or shell company.

Securities acquired under a transaction exempt from registration under Section 4(a)(7) will be deemed “restricted securities” within the meaning of Rule 144. A Section 4(a)(7) transaction will be not be deemed a “distribution” for purposes of the Securities Act.

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## Disclosure Simplification

The FAST Act requires that the SEC undertake various measures designed to simplify and streamline certain of its disclosure rules:

- **Summary page for Form 10-K.** The SEC is required, within 180 days following enactment, to issue regulations permitting issuers to submit a summary page on Form 10-K if each item identified in the summary includes a cross-reference (by electronic link or otherwise) to the material contained in Form 10-K to which the item relates.
- **Simplify Regulation S-K.** The SEC is required, within 180 days following enactment, to take action to revise Regulation S-K to scale or eliminate requirements in order to reduce the burden for EGCs, accelerated filers, smaller reporting companies and other smaller issuers and to eliminate provisions of Regulation S-K that are duplicative, overlapping, outdated or unnecessary. This provision sets a legislative mandate for the SEC to accelerate efforts that form part of its disclosure effectiveness initiative, the elements of which first were raised in the SEC Staff Report on Public Company Disclosure (December 2013) and which resulted in the Request for Comment on the Effectiveness of Financial Disclosures About Entities other than the Registrant (Regulation S-X) (September 2015).
- **Study on modernization and simplification of Regulation S-K.** The SEC is required to undertake a study of Regulation S-K and (i) consider how best to modernize and simplify its requirements; (ii) emphasize a company by company approach that allows material information to be disseminated without boilerplate language or static requirements; and (iii) evaluate methods of information delivery and presentation and explore methods for discouraging repetition. Within 360 days following enactment, the SEC is required to (i) issue a report to Congress regarding its findings and detail its recommendations for modernization and simplification of Regulation S-K, and (ii) issue a proposed rule implementing the report's recommendations.
- **Forward incorporation on Form S-1 for smaller reporting companies.** The FAST Act requires that, within 45 days of enactment, the SEC revise Form S-1 to permit smaller reporting companies (entities that, as of the last business day of their second fiscal quarter, have a public float of less than \$75 million) to incorporate by reference Exchange Act filings made after the effective date of the Form S-1. This new provision will allow smaller reporting companies to use Form S-1 as a shelf registration statement for secondary resales.

The text of the FAST Act is available [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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