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Client Alert

December 2015

The FAST Act's Hidden Changes to "Speed Up" Capital Formation

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act (the "FAST Act"). Several key provisions to stimulate capital markets and to ease reporting under SEC regulations were bolted-on to the FAST Act. Some of these provisions went into effect upon the President's signature; others go into effect on a delayed basis, as noted below. The changes reflect recommendations made to Congress during the last two years by various industry task forces including the Investor Advisory Committee, Advisory Committee on Small and Emerging Companies and the Forum on Small Business Capital Formation.

Amendments to the JOBS Act for Emerging Growth Companies

The FAST Act contains several amendments to the rules originally enacted under the 2012 Jumpstart Our Business Startups Act ("JOBS Act").

- **Shorter Confidential Submission – Roadshow Waiting Period** – *Effective December 4, 2015*. Prior to the FAST Act, an emerging growth company (an "EGC") confidentially submitting its IPO registration statement was required to publicly file its registration statement (and prior confidential submissions) at least 21 days before commencing marketing the IPO by conducting its "roadshow." The FAST Act reduced the 21-day period to 15 days prior to commencing a roadshow by amending Section 6(e)(1) of the Securities Act. The reduction of the roadshow "waiting period" will provide issuers with additional time to market their IPOs before the financial statements included in their registration statements become stale. This is particularly important when the next registration statement amendment would require a new audited fiscal year.

- **Streamlining IPO Registration Process for EGCs** – *Effective January 3, 2016*. An EGC that files a Form S-1 or Form F-1 will no longer be required to initially include two years of audited historical financial statements in its IPO registration statement, as

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required by Regulation S-X, if the following conditions apply. This accommodation is applicable where (i) the EGC "reasonably believes" that Form S-1 or Form F-1 would not require such historical financial statements in the registration statement at the time of the contemplated offering's effectiveness, and (ii) the EGC amends its registration statement to include all financial statements required by Regulation S-X prior to distributing a preliminary prospectus to potential investors. This change – perhaps the most dramatic one noted here – is particularly relevant at this time of the year. Issuers filing a registration statement in their fourth quarter, for instance, would be permitted initially to include historical financial statements that cover just one full audited fiscal year plus the interim period to commence the SEC review process, but would need to subsequently amend the filing to include the full current fiscal year once that period is completed. As a practical matter, this change immediately improves the timing for an offering and correspondingly saves the expense of auditing an entire fiscal year which is ultimately not required to be disclosed. The SEC will amend instructions for Form S-1 and Form F-1 to reflect this change.

- **Grace Period for EGC Status during the IPO Process** – *Effective December 4, 2015*. Before the FAST Act, when an issuer lost its EGC status between filing its IPO registration statement and closing its IPO, it could not take advantage of the benefits of an EGC during the rest of the IPO registration process. Under prior law, an issuer which qualified as an EGC at the time of filing or confidentially submitting its IPO registration statement lost its status where, upon crossing a fiscal year it had $1 billion of revenue in the recently completed fiscal year. Following passage of the FAST Act, an EGC will retain its status until the earlier of (i) the closing of the IPO under the pending registration statement or (ii) one year after the issuer ceased to be an EGC. For fast growing technology companies that are in registration for longer periods, retaining an EGC designation provides multiple benefits and saves considerable re-drafting of the pending registration statement.

Forward Incorporation by Reference in Form S-1 for Smaller Reporting Companies – *Revisions due by January 18, 2016*

Currently, smaller reporting companies are not permitted to file a registration statement on Form S-1 and incorporate by reference filings made by the issuer after the effective date of the registration statement ("forward incorporation by reference"). Under the FAST Act, the SEC has been directed revise Form S-1 to permit forward incorporation by reference by a "smaller reporting company." A smaller reporting company

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is generally defined as an issuer with a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter. This means that a smaller reporting company that is not eligible to register shares for resale using Form S-3 will not need to file supplements or post-effective amendments solely to keep a resale registration statement on Form S-1 current. This change appears to acknowledge the fact that issuers, selling shareholders and investors are comfortable with the SEC's EDGAR database and other digital media to be able to easily gather and review current business information independently of the "outdated" effective registration statement.

New Disclosure Regulations from the SEC – *Must be issued by May 31, 2016*

The FAST Act also requires that the SEC issue new rules with the goal of simplifying and modernizing current disclosure requirements.

- **Summary Page to Form 10-K**. The rules would permit a company to submit a summary page in its annual report on Form 10-K so long as each item in the summary cross-references (by electronic link or otherwise) the complete related material disclosed in the body of the Form 10-K. This change will avoid excessive duplication of information.

- **Simplify and Modernize Regulation S-K**. The SEC is tasked with revising Regulation S-K, the SEC's integrated disclosure regulations, to "further scale or eliminate requirements of Regulation S-K." The goal of these revisions is to reduce the burden imposed on EGCs, accelerated filers, smaller reporting companies and other smaller publicly-traded issuers. The revisions should seek to eliminate "duplicative, overlapping, outdated, or unnecessary" requirements for all issuers.

Further, the SEC must conduct a study of Regulation S-K in consultation with the Investor Advisory Committee and Advisory Committee on Small and Emerging Companies. The study would address (1) how to reduce the regulation's costs and burdens on issuers while still providing all material information, (2) emphasizing a "company-by-company approach that allows relevant and material information to be disseminated to investors without boilerplate language or static requirements" and (3) evaluating how information is delivered and presented, particularly identifying how to discourage repetition and disclosing immaterial information. This study is to be reported to Congress by *November 27, 2016*. Commentators have already focused in on the second area of the study to create a "company-by-company approach," questioning whether the SEC could be comfortable with a disclosure system that gives an issuer the discretion over the materiality of this own public disclosure.

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Section 4(a)(7) Private Resale Exemption – *Effective December 4, 2015*

In the past, private resales of securities by non-issuers (particularly by affiliates of the issuer, such as employees, officers, directors or large shareholders) often relied on the informal "Section 4(1½) exemption," a complicated exemption from the registration requirements of the Securities Act. A provision within the FAST Act adds a new Section 4(a)(7), which effectively codifies the "Section 4(1½) exemption," although there are some differences. This new exemption provides more certainty and facilitates transfers of restricted securities. Under the new provision, private resales are permissible where the following requirements are met:

- Each purchaser is an accredited investor
- There is no general solicitation or general advertising by the seller nor anyone acting on behalf of the seller
- If the issuer is not subject to the reporting requirements of the Securities Act, the seller makes available to a prospective purchaser certain reasonably current information as prescribed in the provision
- The seller is not the issuer or a subsidiary of the issuer
- Neither the seller nor any person who was paid for participating in the offer or sale is a "bad actor" under Regulation D
- The issuer is engaged in business and is not in the organizational stage, bankruptcy or receivership, and is not a blank check, blind pool or shell company
- The securities are not part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter
- The class of securities has been authorized and outstanding for at least 90 days prior to the transaction

Securities acquired under Section 4(a)(7) are deemed "restricted securities" for the purposes of Rule 144. These securities will be "covered securities," exempt from certain aspects of state "blue sky" laws.

The foregoing changes demonstrate Congress's continued interest in chiseling into law more and more accommodations to assist IPO issuers and smaller public companies. We will update our clients on these legal developments.

A copy of the FAST Act is available here. For more information, please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below.

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