

FAST Act Implications for Underwriters (UPDATE)

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Capital Markets & Securities

The Fixing America's Surface Transportation Act ("FAST Act") was enacted on December 4, 2015, and contains several provisions that may be beneficial to investment banks acting as underwriters in emerging growth company ("EGC") IPOs. In our December 9, 2015 client alert we summarized two of the key provisions.

UPDATE: Subsequently, on December 10, 2015, the staff ("Staff") of the Securities and Exchange Commission's ("SEC") Division of Corporation Finance released two Compliance and Disclosure Interpretations regarding FAST Act relaxation of financial statement requirements for EGCs. This client alert restates our December 9 summary, updated to reflect the Staff's recent guidance.

Reduced Roadshow Waiting Period

Effective immediately, the FAST Act has reduced the required waiting period between the initial public filing of a registration statement and the start of the IPO roadshow from 21 calendar days to 15 calendar days.

Reduced Financial Statement Burden (UPDATE)

Effective immediately¹, an EGC may omit in a registration statement financial information for historical periods otherwise required by Regulation S-X as of the time of filing (or confidential submission) of such registration statement, provided that (a) 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 contemplated offering and (b) prior to the issuer distributing a preliminary prospectus to investors, such registration statement is amended to include all financial information required by Regulation S-X at the date of such amendment.

SEC Compliance and Disclosure Interpretations: The Staff's December 10 guidance addresses two important points not obvious from the text of the FAST Act:

- An EGC issuer **may not** omit interim financial statements from its filing or submission relating to a period that will be included within required financial statements covering a longer interim or annual period at the time of the offering, even though the shorter period will not be presented separately at that time. For example, in the case of an EGC issuer that is contemplating a December 2015 initial confidential submission and an April 2016 IPO launch, the issuer could omit 2013 annual financial statements from the initial submission, but it **could not exclude** its nine-month 2015 and 2014 interim financial statements. The Staff's view in this case is that the 2015 and 2014 nine-month interim financial information "relates to" financial information that will be included in the

¹ While the FAST Act provided that EGC issuers could rely on this provision 30 days after enactment, the Staff has since issued guidance stating that it will not object if EGC issuers apply this provision immediately.

registration statement at the time of the April 2016 IPO—because the nine-month numbers will be embedded in the corresponding annual financial statements—even though standalone 2014 and 2015 interim financials will not be separately presented in the final prospectus.

- An EGC issuer **may** omit financial statements of other entities (for example, acquired businesses) from its filing or submission if it reasonably believes that those financial statements will not be required at the time of the offering. For example, in the case of an EGC issuer that is contemplating a December 2015 initial confidential submission and an April 2016 IPO launch, the issuer may omit from the initial submission financial statements of an acquired business that would otherwise be required by Rule 3-05 of Regulation S-X if it expects that at the time of the April 2016 IPO the acquired business's financial results will have been reflected in the issuer's financial statements for a sufficient amount of time to obviate the need for separate financial statements.

If you have any questions concerning the material discussed in this client alert, please feel free to contact any of the following members of our Capital Markets & Securities practice group:

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