Understanding the Implications of the Fast Act

*By Matthew L. Fry and Michael M. Pritchard**

On December 4, 2015, the Fixing America's Surface Transportation ("***FAST***") Act was signed into law. While the main purpose of the FAST Act is to provide long-term funding for surface transportation infrastructure planning and investment, the FAST Act includes a number of changes to the federal securities laws that are intended to modernize disclosure requirements for documents filed with the Securities and Exchange Commission (the "***Commission***"), reduce disclosure requirements for smaller reporting companies, enhance certain aspects of the Jumpstart Our Business Startups ("***JOBS***") Act and facilitate unregistered resales of securities.

The legislative history of the FAST Act shows that the securities law provisions included in the FAST Act generated widespread, bipartisan support.[1] Accordingly, it is likely that these amendments were included as riders to the FAST Act so that they could be adopted more quickly than they otherwise may have been under a larger bill aimed at reforming capital markets activities.

The securities law riders included in the FAST Act can generally be grouped into four distinct categories, each of which is discussed in greater detail below: (I) disclosure modernization and simplification, (II) disclosure relief for smaller reporting companies, (III) amendments to the JOBS Act and (IV) the new Section 4(a)(7) resale exemption. The purpose of this article is to analyze the securities law riders included in the FAST Act and provide practical guidance to issuers and practitioners concerning the FAST Act's implications.

I. Disclosure Modernization and Simplification

In 2012, as part of the JOBS Act, Congress issued a mandate to the Commission to review its public company disclosure requirements with the goal of determining how to revise the requirements to make them more effective and eliminate unnec-

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essary disclosures.[2] In December 2013, the staff of the Commission delivered a report to Congress offering its preliminary recommendations concerning disclosure reform.[3] The report recommended further review of the Commission's existing disclosure requirements, and, as a result, the Commission adopted a reform initiative called the "Disclosure Effectiveness Initiative." As part of the Disclosure Effectiveness Initiative, the Commission has continuously sought public comments from market participants on how to make disclosures more effective.[4] Most recently, in September 2015, the staff of the Commission issued a public announcement seeking comments on the effectiveness of the financial disclosure requirements in Regulation S-X and in April 2016, the staff of the Commission published a concept release seeking comments on modernizing the disclosure requirements of Regulation S-K.

In the spirit of the Commission's ongoing review of disclosure effectiveness, Congress included several provisions in the FAST Act that require the Commission to simplify and reform its disclosure requirements, as well as conduct a study and report to Congress on how to modernize disclosure requirements while still providing investors with all material information.[5]

(a) Summary Page for Annual Reports on Form 10-K

Section 72001 of the FAST Act requires the Commission to issue regulations permitting companies that are required to file Annual Reports on Form 10-K to include a summary page in their annual reports.[6] The summary page is required to include a cross-reference to the applicable material contained in the Form 10-K.[7] On June 1, 2016, the Commission issued an interim final rule to amend Part IV of Form 10-K by adding a new Item 16 that allows a registrant, at its option, to include a summary in its Form 10-K.[8] The interim final rule does not require that the summary be prepared in any particular format or that it cover any particular items in a registrant's Form 10-K.[9] The interim final rule estimates that approximately 814 registrants are expected to include summaries in their Form 10-Ks in the future.

(b) Improvement of Regulation S-K

Section 72002 of the FAST Act requires the Commission to further scale or eliminate disclosure requirements under Regulation S-K for emerging growth companies, accelerated filers, smaller reporting companies and other smaller issuers, as well as eliminate disclosure requirements thereunder for all issuers that are duplicative, overlapping, outdated or unnecessary.[10] Pursuant to Section 72002 of the FAST Act, the Commission was required to issue rules making these revisions no later than June 1, 2016, subject to the determination that no further study is warranted

to "determine the efficacy" of the revisions to Regulation S-K.[11] On July 16, 2016, the Commission published its initial proposals pursuant to Section 72002 of the FAST Act to eliminate certain disclosure obligations that the Commission identified as overlapping.[12]

(c) Study on Modernization and Simplification of Regulation S-K

Pursuant to Section 72003 of the FAST Act, the Commission is required to conduct a study to determine how best to modernize and simplify its disclosure requirements to reduce costs and burdens on issuers, emphasizing a company by company approach, and evaluate methods of information delivery and presentation.[13] In conducting the study, the Commission must consult with the Investor Advisory Committee and the Advisory Committee on Small and Emerging Companies.[14]

Section 72003(c) of the FAST Act requires the Commission to issue a report to congress by November 28, 2016, detailing its findings and providing specific and detailed recommendations on how to revise its disclosure requirements, including recommendations on ways to improve the readability and navigability of disclosure documents to discourage repetition and the disclosure of immaterial information.[15]

In December 2013, the staff of the Commission issued a report on the effectiveness of its disclosure requirements pursuant to the JOBS Act. In that report, the staff of the Commission focused its review on the requirements of Regulation S-K, which is the same subject of the review required by the FAST Act.[16] Among other things, the staff of the Commission reviewed Regulation S-K, including the history of its provisions, Commission releases, comment letters and public comments.[17]

In the recommendation of the December 2013 report, the staff of the Commission noted that the report served as "an important starting point," but that "further information gathering and review is warranted in order to formulate specific recommendations regarding specific disclosure requirements."[18] The report goes on to state that any reevaluation of disclosure requirements will require input from market participants and economic analysis.[19] Ultimately, the conclusion of the report was to recommend a plan to systematically review all of the Commission's disclosure requirements, including Regulation S-K, Regulation S-X and the Commission's rules and forms, either on a comprehensive or targeted basis.[20] As noted above, while the Commission has continued to support its Disclosure Effectiveness Initiative, including seeking input from market participants on its disclosure requirements, it has not engaged in any rulemaking to generally

modernize or simplify its disclosure requirements.

While it is not clear what impact the FAST Act will have on the Commission's Disclosure Effectiveness Initiative, it is worth noting that both the mandate in the JOBS Act and the FAST Act require the Commission to focus its review on Regulation S-K. In the report issued by the staff of the Commission in December 2013, the staff recommended a more comprehensive review of all of the Commission's disclosure requirements, and in September 2015, the Commission began soliciting public comments on the disclosure requirements included in Regulation S-X. Accordingly, the mandate in the FAST Act may be seen as Congress pressuring the Commission to direct its efforts on reforming Regulation S-K rather than focusing on the comprehensive review advocated by the Commission through its Disclosure Effectiveness Initiative.

II. Disclosure Relief for Smaller Reporting Companies

(a) Background

Currently, registrants that meet the definition of a "smaller reporting company" may take advantage of scaled disclosure requirements that are intended to reflect the characteristics and needs of smaller companies and their investors. In general, a smaller reporting company is defined as one with a public float of less than $75 million, or, if the company is unable to calculate its public float, if it has annual revenues of less than $50 million.[21] The scaled disclosure requirements for smaller reporting companies permit them to, among other things, omit selected financial data and risk factors from their reports and registration statements and provide a more limited historical discussion in the business, management's discussion and analysis of financial condition and results of operations and financial statements sections of their reports and registration statements.[22]

Because a smaller reporting company is generally a company with less than a $75 million public float, most smaller reporting companies are not eligible to file a short-form registration statement on Form S-3 for registered primary offerings due to Form S-3's requirement that an issuer have a public float of $75 million or more within 60 days prior to the filing of a Form S-3 for a primary offering.[23] In addition, smaller reporting companies that do not have securities listed on a national securities exchange are generally not eligible to file a resale registration statement on Form S-3.[24] Most national securities exchanges require listed issuers to maintain a minimum trading price of $1.00 per share for equity securities, a requirement that many smaller reporting companies cannot meet.[25] As a result, Form S-3 is often not available for resale registration statements by this class of issuers.[26] Because Form S-3 has generally been unavailable to smaller

reporting companies, these issuers have typically had to file registered primary or secondary offerings on the long-form registration statement of Form S-1.

A primary advantage of Form S-3 over Form S-1 has been that Form S-3 allows certain information to be omitted from the registration statement and incorporated by reference from other documents filed with the Commission, including the forward incorporation by reference of those documents filed after the effective date of the registration statement.[27] This has provided substantial cost savings to issuers eligible to use Form S-3 because they do not have to supplement or amend a prospectus or registration statement for material developments that are reported on other forms filed with the Commission and incorporated by reference.[28] Historically, Form S-1 has not allowed subsequent filings to be incorporated by reference, and therefore an issuer that has had an effective registration statement on Form S-1 related to an ongoing or continuous offering, such as a "shelf" or a resale offering, has been required to update the prospectus in the registration statement with prospectus supplements and post-effective amendments.[29]

Section 84001 of the FAST Act provided relief to smaller reporting companies by requiring the Commission to amend Form S-1 to allow smaller reporting companies to incorporate by reference documents filed subsequent to the effective date of a registration statement.[30] Effective January 19, 2016, the Commission adopted interim final rules to amend Item 12 of Form S-1 to allow forward incorporation by reference and to make conforming changes to the undertakings that are required to be included by issuers filing a registration statement on Form S-1.[31] Specifically, Form S-1 was amended to include a new Item 12(b), which permits a smaller reporting company to incorporate by reference information filed after the effective date of the registration statement, provided that the smaller reporting company includes a statement in the registration statement that all documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"), prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.[32] This statement is the same as the language required under Item 12(b) of Form S-3 for registrants wishing to forward incorporate reports into a registration statement on Form S-3.[33]

(b) Requirements for Forward Incorporation by Reference

Under the amended Form S-1, a registrant wishing to incorporate future filings into its registration statement must meet the following eligibility requirements:

- the registrant must be subject to the reporting requirements of the Exchange Act;
- the registrant must have filed all reports and other materials required to be filed by the Exchange Act during the preceding 12 months (or such shorter period that the issuer was required to file such reports and materials);
- the registrant must have filed its annual report for its most recently completed fiscal year;
- the registrant (i) must not have been, during the past three years, a blank check company, a shell company (other than a business combination shell company) or a registrant for an offering of penny stock and (ii) must not be registering an offering to effect a business combination transaction; and
- the registrant must make its periodic reports and current reports filed pursuant to the Exchange Act readily available on the registrant's website.[34]

In addition, Form S-1 requires a registrant forward incorporating information by reference to make the following specific statements:

- that it incorporates by reference (i) its latest Annual Report on Form 10-K and (ii) all other reports, proxy statements and information statements filed pursuant to the Exchange Act since the end of the fiscal year covering the annual report referred to in clause (i);
- that all documents subsequently filed pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering shall be deemed to be incorporated by reference;
- that it will provide, upon oral or written request, to each person to whom a prospectus is delivered, including any beneficial owner, without charge, a copy of any or all of the reports or documents that have been incorporated by reference but not delivered with the prospectus; and
- the name, address, telephone number and email address, if any, to which requests for copies of reports should be made, and the registrant's website address where such reports can be accessed.[35]

The interim final rules also made a conforming change to the undertaking in Item 512(a)(1)(iii)(B) of Regulation S-K to provide that a registrant is not required to file a post-effective amendment or prospectus supplement where the information that would otherwise be required to be included in a prospectus is contained in reports that have been incorporated by reference.[36] Registrants that intend to forward incorporate information in a registration statement on Form S-1 will also need to include the undertaking

provided by Item 512(b) of Regulation S-K, which registrants have typically excluded from registration statements on Form S-1 due to the form's the historical bar on forward incorporation by reference.

We expect that we will see more smaller reporting companies taking advantage of this amendment in the future, especially those issuers that are filing resale shelf registration statements. We have found that the relief has been most beneficial for our clients that have a registration rights agreement requiring them to maintain an effective resale shelf registration statement indefinitely because they are former shell companies.[37]

In the future, the Commission has signaled that it may also consider extending forward incorporation by reference to other types of issuers or other forms. In the interim final rules, the Commission requested comment on "whether the interim final rules should be extended to other registrants or forms."[38] A number of law firms and other commenters have issued letters to the Commission requesting that forward incorporation by reference on Form S-1 be extended to other types of registrants, including foreign registrants filing registration statements on Form F-1 and registrants with a public float of greater than $75 million.[39] Among other things, commenters argue that, given the ubiquity and ease of obtaining disclosures online, allowing all types of registrants to forward incorporate information would eliminate duplicative disclosure that is costly and inefficient.[40]

III. Amendments to the JOBS Act

The FAST Act also expands upon or enhances certain provisions contained in the JOBS Act with a goal of improving access to capital by emerging growth companies. The JOBS Act, enacted in April 2012, established a new category of registrant known as an "emerging growth company."[41] In general, an emerging growth company is a company with annual gross revenues of less than $1 billion during its most recent fiscal year.[42] A company loses emerging growth company status upon the earliest to occur of:

- the end of the fiscal year in which its annual revenues exceed $1 billion;
- the end of the fiscal year in which the fifth anniversary of its initial public offering occurred;
- the date on which the company has, during the prior three-year period, issued more than $1 billion in non-convertible debt; and
- the date on which the company qualifies as a "large accelerated filer," as defined in Rule 12b-2 under the Exchange Act.[43]

The JOBS Act also amended the federal securities laws to provide scaled disclosure requirements to emerging growth companies in their initial public offerings and public reporting obligations.[44] With respect to the initial public offering process, one of the principal forms of relief granted to emerging growth companies was the ability to confidentially submit a draft registration statement, including any amendments thereto, to the Commission.[45] This provides emerging growth companies with additional flexibility to keep information concerning their businesses confidential when the company's valuation is uncertain or the timing of the offering depends upon regulatory approvals. It also allows an emerging growth company to withdraw from the initial public offering process without experiencing the harm or embarrassment of failing to complete an initial public offering that has been publicly announced.

In general, the amendments to the JOBS Act provided in the FAST Act further enhance or clarify the benefits given to emerging growth companies.

(a) Reduction in Waiting Period between Public Filing and Road Show

As described above, emerging growth companies are permitted to confidentially submit to the Commission draft registration statements related to initial public offerings. Under the JOBS Act, an emerging growth company is not required to publicly file its initial public offering registration statement until at least 21 days prior to the commencement of its road show.[46] The FAST Act reduces this waiting period between publicly filing and commencing the road show to 15 days.[47] This change became effective immediately upon the enactment of the FAST Act, and the staff of the Commission has publicly stated that emerging growth companies that had pending initial public offerings prior to the enactment of the FAST Act can rely upon the shortened period.[48]

Despite the previous waiting period of only 21 days provided for in the JOBS Act, most emerging growth companies publicly file their initial public offering registration statements well in advance of their roadshows. For instance, in the first year after the JOBS Act was enacted, of those emerging growth companies that confidentially submitted initial public offering registration statements, an average of 49 days elapsed between the public filing and the launch of the roadshow.[49] While the FAST Act provides more flexibility to issuers, we expect that the majority of emerging growth companies will continue to publicly file their registration statements well in advance of the roadshow in order to ensure that there is adequate marketing time.

There are a number of theoretical advantages to emerging

growth companies related to the shortening of the waiting period, such as allowing emerging growth companies to maintain confidential status longer and providing emerging growth companies with a greater delay before having to publicly announce sensitive or confidential business information that may impact the initial public offering. We believe that the greatest advantage of the shortened waiting period will be in providing emerging growth companies with additional flexibility in timing their road shows to take advantage of market windows that arise unexpectedly.

(b) Grace Period for Emerging Growth Company Status

Rule 401(a) of the Securities Act of 1933, as amended (the "***Securities Act***"), provides that the "form and contents of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus."[50] In interpreting this rule, the staff of the Commission previously stated that if a company files a registration statement at a time when it qualifies as an emerging growth company, the disclosure provisions for emerging growth companies would continue to apply through effectiveness of the registration statement even if the company loses its emerging growth company status while in the registration process.[51] Although the staff's guidance has been removed since the adoption of the FAST Act, the staff previously took the position that the confidential submission of a draft registration statement, whether initially or by amendment, did not constitute a filing pursuant to Rule 401(a). Accordingly, a company was required to meet emerging growth company status at the time of each confidential submission or the time of its first public filing of its registration statement to continue the review process.[52]

Section 71002 of the FAST Act reverses the staff's position and provides that if an emerging growth company loses its status after a confidential submission or public filing of a registration statement, it will continue to be treated as an emerging growth company until the earlier of (i) the consummation of the emerging growth company's initial public offering and (ii) the one-year anniversary of the loss of status as an emerging growth company.[53] This amendment became effective upon the FAST Act's enactment.[54]

The staff of the Commission also previously took the position that an emerging growth company engaging in testing-the-waters communications, which are certain communications that emerging growth companies may initiate with limited groups of sophisticated investors concerning a contemplated initial public offering prior to the effectiveness of a registration statement, must qualify as an emerging growth company at the time the testing-the-

waters communications are made.[55] The FAST Act did not directly impact this position, and the staff of the Commission has not updated its position in light of the FAST Act.[56]

(c) Reduction in Financial Statement Disclosure Requirements for Emerging Growth Companies

Registration statements and reports filed with the Commission require the inclusion of financial statements that can be onerous for issuers and, in particular, new registrants. In the initial public offering context, for example, Regulation S-X generally requires a registration statement on Form S-1 to include an audited balance sheet as of the end of the two most recent fiscal years and audited income statements and statements of cash flows for each of the three fiscal years preceding the date of the most recent audited balance sheet being filed.[57] In addition, depending on the timeframe in which a registration statement is filed in relation to the fiscal year end of the issuer, the registration statement may need to include unaudited interim financial statements as of the end of the issuer's latest fiscal quarter and a comparison to the prior period in its last fiscal year.[58]

Smaller reporting companies have limited relief from these requirements and are permitted to only include financial statements including audited income statements and statements of cash flows for each of the two years preceding the date of the most recent audited balance sheet being filed.[59] These scaled financial statement disclosure requirements for smaller reporting companies were extended to emerging growth companies through the JOBS Act.

Section 71003 of the FAST Act further scales financial statement disclosure requirements for emerging growth companies by requiring the Commission to amend Form S-1 and Form F-1 to provide that an emerging growth company may omit financial information for historical periods that would otherwise be required to be included in a registration statement for an initial public offering if (i) the registrant reasonably believes that the omitted financial information will not be required to be included in the registration statement at the time of the actual initial public offering and (ii) prior to the distribution of a preliminary prospectus to investors, the registration statement is amended to include all financial information required by Regulation S-X at the time of the actual initial public offering.[60] Interim final rules adopting these revisions became effective on January 19, 2016.[61]

Shortly after the FAST Act was enacted, the staff of the Commission published new Compliance and Disclosure Interpretations ("***C&DIs***") clarifying the operation of Section 71003 of the FAST Act.[62] Pursuant to the C&DIs, the staff of the Commission

has taken the position that:

- an emerging growth company may not omit interim financial statements from a filing when the interim period relates to a longer period that must be presented in the financial statements at the time of the offering (e.g., an issuer submitting a registration statement in December 2015 for an offering planned for April 2016 must include 2014 and 2015 financials and may omit 2013 financials, but may not omit nine-month 2015 and 2014 interim financials because they relate to annual financials that must be included at the time of the offering in April 2016); and
- an emerging growth company may omit financial statements of other entities if it reasonably believes those financials will not be required at the time of the offering (e.g., for acquired businesses).[63]

We believe that of the various amendments to the JOBS Act resulting from the FAST Act, the ability of emerging growth companies to omit unnecessary historical financial statements may have the most immediate and practical benefit to companies looking to launch an initial public offering. This change allows issuers to avoid the burden and expense of preparing financial statements that will ultimately be irrelevant at the time of an offering, which should also help reduce the time necessary to complete a registration statement. In addition, by not including unnecessary financial statements, issuers may avoid the time and expense necessary to respond to any comments that the Commission may have on these financials. We also expect that this relief will cause issuers to submit or file registration statements sooner than they otherwise may have. We would not be surprised, however, if issuers elect to continue to prepare, if not provide, historical financials that are not required in order to provide a longer financial history of the company for marketing purposes.

(d) Section 12(g) Registration Requirements for Savings and Loan Holding Companies

Section 12(g) of the Exchange Act historically required a company to register its equity securities with the Commission if such securities were held of record by 500 or more persons and the company had total assets exceeding $10.0 million as of its last fiscal year end. The JOBS Act amended the threshold for record holders to provide that a company need not register its equity securities with the Commission until it had either 2,000 record holders of a class of equity securities or 500 record holders that were not accredited investors as of its last fiscal year end.

With respect to banks and bank holding companies, which are treated separately for Section 12(g) registration purposes, the

JOBS Act (i) amended the registration threshold to provide that a bank or bank holding company need not register its equity securities with the Commission until its securities were held of record by 2,000 persons as of its last fiscal year end and (ii) amended the deregistration threshold to provide that a bank or bank holding company may deregister its equity securities and suspend its reporting obligations when its securities were held of record by less than 1,200 persons as of its last fiscal year end.

Section 85001 of the FAST Act further amends Section 12(g) to provide savings and loan holding companies with the same relief from the Section 12(g) registration requirements as banks and bank holding companies.[64] This change became effective upon the enactment of the FAST Act, and on May 3, 2016, the Commission adopted a final rule implementing the change.[65] The staff of the Commission has also issued several C&DIs discussing the implementation of this amendment.[66] We believe that the omission of savings and loan holding companies from the registration threshold amendments included in the JOBS Act was unintentional, and this provision in the FAST Act is intended to correct that omission.

IV. New Resale Exemption

For many years, practitioners have utilized an "exemption" to the registration requirements of the Securities Act for private resales of securities known as the "Section 4(a)(1-1/2) exemption." The Section 4(a)(1-1/2) exemption is not part of the Securities Act and has not been adopted by the Commission, though the Commission has acknowledged its existence.[67]

Section 76001 of the FAST Act includes a new registration exemption for private resales of securities pursuant to a new Section 4(a)(7).[68] Section 4(a)(7) has frequently been characterized as a "codification" of the Section 4(a)(1-1/2) exemption, and while it is true that Section 4(a)(7) was designed to fill the same statutory gap as the Section 4(a)(1-1/2) exemption, we believe this characterization is an oversimplification. The statutory requirements for compliance with the Section 4(a)(7) exemption are quite distinct and exact compared to those required for compliance with the Section 4(a)(1-1/2) exemption, which are uncertain and consist of principles-based guidelines. As a result, meeting the Section 4(a)(1-1/2) exemption is more flexible than fitting within the narrow statutory confines of Section 4(a)(7). Because Section 4(a)(7) does not eliminate the ability for a seller to rely on the Section 4(a)(1-1/2) exemption, we expect that the Section 4(a)(1-1/2) exemption will continue to be widely used by practitioners and that Section 4(a)(7) will be utilized in more limited circumstances where sellers want the certainty of a statutory safe harbor.[69]

(a) Section 4(a)(1-1/2)— Background and Conditions

The Section 4(a)(1-1/2) exemption is a hybrid exemption based in Section 4(a)(1) of the Securities Act that relies on certain criteria from the exemptions in both Sections 4(a)(1) and 4(a)(2) of the Securities Act. Section 4(a)(1) of the Securities Act provides an exemption from the registration requirements thereof for "transactions by any person other than an issuer, underwriter, or dealer."[70] Section 4(a)(2) of the Securities Act provides an additional exemption for "transactions by an issuer not involving any public offering."[71]

Interpretations of the term "underwriter" as used in the Section 4(a)(1) exemption made it difficult to ascertain compliance with the exemption. Section 2(a)(11) of the Securities Act defines an "underwriter" as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."[72] Courts have interpreted the definition of an "underwriter" broadly in certain circumstances, leaving uncertainties in application as to whether a person selling a security purchased with a view to distribution.

Rule 144 under the Securities Act was promulgated to provide clarity in the form of a non-exclusive safe harbor from the definition of an "underwriter." Because Rule 144, however, only provides for resales of a limited number of securities by affiliates and for resales of restricted securities after a minimum holding period has been met, gaps in the statutory scheme for exemptions from registration remained for (i) affiliates desiring to sell a larger volume of securities than permitted under Rule 144 and (ii) purchasers of restricted securities wishing to sell securities before the Rule 144 holding period has been met.[73]

To account for the gap in the statutory regime, practitioners have developed, and the Commission has acknowledged, a non-statutory exemption known as the "Section 4(a)(1-1/2) exemption" that requires compliance with "some of the established criteria for sales under both Section 4(a)(1) and Section 4(a)(2) of the [Securities] Act."[74] In essence, the theory behind the Section 4(a)(1-1/2) exemption is that a transaction undertaken by an issuer that would meet the criteria to qualify for exemption under Section 4(a)(2) should not constitute a distribution if undertaken by an affiliate of the issuer or a holder of the issuer's securities. Practitioners generally agree that for a transaction to comply with the Section 4(a)(1-1/2) exemption, some or all of the following factors must be met:

- the securities should be offered and sold without general solicitation or advertising;
- the offering should be made to a limited number of purchasers;

- information about the seller should be provided to the purchaser;
- the seller should not have purchased the securities with a view towards private distribution in violation of the Securities Act;
- the purchaser should be acquiring the securities for investment purposes, not for immediate resale, and should make representations to that fact and should agree to placing transfer restrictions on the securities; and
- the purchaser should be sophisticated and capable of evaluating of the prospective investment.[75]

The Commission has not provided guidance on the exact criteria that must be satisfied to perfect the Section 4(a)(1-1/2) exemption, and, as a result, there is some uncertainty in whether a given transaction is qualified to utilize the exemption. In particular, it is not clear in what circumstances Section 4(a)(1-1/2) may require a holding period before an affiliate or a non-affiliate resells securities.

(b) Section 4(a)(7)—New Exemption

The Section 4(a)(7) exemption provided by the FAST Act spawned out of the Reforming Access for Investments in Startup Enterprises ("RAISE") Act of 2015 (H.R. 1839), which was originally introduced by Congressman Patrick McHenry in April 2015.[76] According to Congressman McHenry, the purpose of the bill was to help emerging companies, entrepreneurs and investors achieve liquidity in secondary markets by providing a clear and established legal framework for resale transactions.[77]

(i) Conditions to the Section 4(a)(7) Exemption

Section 4(a)(7) provides an exemption from the registration requirements of the Securities Act for private resales meeting the following requirements:

1. **Accredited Investor Requirement:** Each purchaser must be an "accredited investor," as defined in Rule 501(a) of the Securities Act.[78] Notably, the definition of accredited investor in Rule 501(a) includes individuals that meet certain criteria and individuals that the *issuer* "reasonably believes" meet certain criteria.[79] It is uncertain how the reasonable belief qualifier included in Rule 501(a) applies for purposes of a resale meeting the Section 4(a)(7) exemption.
2. **Prohibition on General Solicitation and Advertising:** Neither the seller, nor any person acting on the seller's behalf, may engage in any form of general solicitation or advertising.[80]
3. **Private Company Information Requirement:** With respect to a resale of securities issued by a non-reporting is-

suer, the seller must provide the purchaser with the following information:

- the exact name of the issuer and its predecessor (if any);
- the address of the issuer's principal executive offices;
- the exact title and class of the securities;
- the par or stated value of the securities;
- the number of shares or total amount of the securities outstanding as of the issuer's most recent fiscal year end;
- the name and address of the issuer's transfer agent, corporate secretary or other person responsible for transferring shares and stock certificates;
- a statement of the nature of the business of the issuer and the products and services it offers, which is presumed current if the statement is as of 12 months before the transaction date;
- the names of the issuer's officers and directors;
- the names of any persons registered as a broker, dealer or agent that will be paid or given, directly or indirectly, any commission or remuneration for participation in the offer or sale of the securities;
- if the seller is a control person of the issuer, a brief statement regarding the nature of the affiliation and a certification by the seller that it has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations; and
- the seller must provide reasonably current financial information, including:
    - the issuer's most recent balance sheet and income statements for the 2 preceding fiscal years (or such shorter time as the issuer has been in operation) prepared in accordance with generally accepted accounting principles (or International Financial Reporting Standards);[81] and
    - if the balance sheet is not as of a date less than 6 months before the transaction date, it must be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than 6 months before the transaction date.[82]

4. **Disqualification of Issuers:** The seller may not be the issuer of the securities or a direct or indirect subsidiary of the issuer.[83]
5. **Bad Actor Prohibition:** The seller and any person being paid commission or remuneration in connection with the

transaction (including solicitors) must not be subject to a "bad actor" disqualification set forth in Rule 506(d)(1) of Regulation D or a "statutory disqualification" set forth in Section 3(a)(39) of the Exchange Act.[84]

6. **Business Requirement:** The issuer must be engaged in business and not be (i) in the organizational stage, (ii) engaged in a bankruptcy or receivership, (iii) a blank check, blind pool or shell company with no specific business plan or that has indicated its primary business plan is to engage in a merger with an unidentified person.[85]
7. **Underwriter Disqualification:** The securities to be resold must not be the whole or 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.[86]
8. **Outstanding Class Requirement:** The securities to be resold must be part of a class of securities that has been authorized and outstanding for at least 90 days prior to the date of the transaction.[87]

(ii) Analysis of the Section 4(a)(7) Exemption

The new Section 4(a)(7) exemption provides a statutory means of ensuring a private resale of securities is exempt from the registration requirements of the Securities Act. Similar to the Section 4(a)(1-1/2) exemption, Section 4(a)(7) borrows concepts from the Section 4(a)(2) private offering exemption, such as the requirement that each purchaser be sophisticated or an accredited investor and that no advertising or solicitation occur in connection with the sale. Despite these similarities, the stricter requirements of Section 4(a)(7) exemption make it narrower than the Section 4(a)(1-1/2) exemption. Several advantages provided by the Section 4(a)(7) exemption over the Section 4(a)(1-1/2) exemption are as follows:

i. **Certainty:** While best practices have developed for meeting the Section 4(a)(1-1/2) exemption, the criteria for perfecting the exemption vary based on facts and circumstances, which can make compliance uncertain. Because the criteria for meeting the Section 4(a)(7) exemption is clearly laid out in the Securities Act, it is easier to ascertain whether a resale complies with the Section 4(a)(7) exemption than the Section 4(a)(1-1/2) exemption. Such added certainty could also simplify the process for law firms to issue opinions on Section 4(a)(7) transactions that otherwise would be required to qualify for the Section 4(a)(1-1/2) exemption.
ii. **Blue Sky Preemption:** The FAST Act amends Section 18(b)(4) of the Securities Act to provide that securities sold pursuant to Section 4(a)(7) qualify as "covered securities."[88]

As a result, state "blue sky" regulation and qualification of securities sold in a Section 4(a)(7) transaction are pre-empted by federal law. While Section 4(a)(1-1/2) does not exempt securities sold from state regulation, Section 18 of the Securities Act provides that securities that are otherwise listed or authorized for listing on a national securities exchange are exempt from state "blue sky" laws.[89] Accordingly, this advantage for Section 4(a)(7) transactions will only impact resales of securities issued by private companies or companies whose securities trade in the over-the-counter markets.

iii. **No Express Limit on the Number of Purchasers:** Traditionally, practitioners have advised that the number of purchasers in a resale pursuant to Section 4(a)(1-1/2) should be limited in order to ensure that the transaction is not considered a distribution. Section 4(a)(7), however, does not provide any limitation on the number of purchasers in a given transaction, only that that they all be accredited investors.[90]

iv. **No Holding Period:** As a means to ensure that the seller acquired the securities to be sold with an investment intent, practitioners often impose a holding period before resales may be made pursuant to the Section 4(a)(1-1/2) exemption. Section 4(a)(7) does not require any specific holding period before taking advantage of the exemption, although it does require that the class of the securities resold to have been authorized and outstanding for at least 90 days prior to the date of the transaction.[91] As a result, Section 4(a)(7) may provide a significant advantage of Section 4(a)(1-1/2) for security holders wishing to resell securities that they have held for a limited amount of time.

Nonetheless, because the FAST Act did not eliminate a seller's ability to rely on the Section 4(a)(1-1/2) exemption, we expect that many sellers will continue to rely on Section 4(a)(1-1/2) due to the following disadvantages associated with the Section 4(a)(7) exemption:

i. **Bad Actor Disqualification:** Unlike Section 4(a)(1-1/2), the seller (and certain solicitors or brokers) in a Section 4(a)(7) transaction must not be subject to a bad actor disqualification.[92] Ordinarily, an issuer determines whether its affiliates, directors, executive officers or any other offering participants are subject to a bad actor disqualification when the issuer is selling securities pursuant to the exemption provided by Rule 506. Rule 506(d)(2)(iv) provides a due care exception to the bad actor disqualifications that states that if an issuer, after exercising reasonable care, was not

aware of a bad actor disqualification, such disqualification will not prevent the issuer from relying on Rule 506.[93] It is unclear whether this due care exception would apply to Section 4(a)(7). Accordingly, ensuring that the seller, solicitor, promoter and other transaction intermediaries in a Section 4(a)(7) transaction are not subject to bad actor disqualifications would greatly increase the amount of diligence that must be completed in connection with the resale, and we expect that many sellers would not want to incur the corresponding legal expenses.

ii. **Compliance Certification:** With respect to a control person reselling securities issued by a private company, the seller must provide a certification that it has no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations.[94] As with the requirement that the seller is not subject to a bad actor disqualification, this requirement significantly increases the diligence required to complete the transaction, in addition to increasing the seller's potential liability with respect to the transaction.

iii. **Information Requirements and Issuer Cooperation:** Depending on the facts and circumstances, in order to meet the investor sophistication requirements under the Section 4(a)(1-1/2) exemption, the purchaser may need to receive or have access to certain information about the issuer.[95] Section 4(a)(7) removes the ability to make a judgment call that sufficient information has been provided, or that this requirement is otherwise satisfied, by requiring that purchasers of private company securities be furnished with specific information and financial statements.[96] While this information should generally not be onerous to compile, other than the financial statements, it will require that the seller obtains the cooperation of the issuer. As a result, we expect that practitioners who represent investors will update their form documents to obligate issuers to provide the disclosures required by Section 4(a)(7) upon the request of an investor. However, security holders of a private issuer will not be able to utilize the Section 4(a)(7) exemption if the issuer withholds the information that the seller needs to provide to perfect the exemption.

Ultimately, both the Section 4(a)(7) exemption and the Section 4(a)(1-1/2) exemption suffer from the same drawback: the securities resold pursuant to the exemption are restricted securities.[97] As a result, we expect that the majority of private sellers will continue to take advantage of the exemption provided by Rule

144 when it is available. The following table provides a summary of the requirements for meeting the exemptions provided by Section 4(a)(7), Section 4(a)(1-1/2) and Rule 144:

	Section 4(a)(1-1/2)*	**Section 4(a)(7)**	**Rule 144 (By a Non-Affiliate)**	**Rule 144 (By an Affiliate)**
Restriction on Resale	Restricted	Restricted	Unrestricted	Unrestricted
Purchaser	Sophisticated	Accredited Investor	None	None
Advertising/ General Solicitation	Not allowed	Not allowed	Public sales permitted	Public sales permitted
Number of Purchasers	Unclear, but some upper limit may apply	No express limit, but the prohibition on general solicitation may effectively limit the number of purchasers	No restriction	No restriction
Holding Period	Unclear	None, but class of securities must be outstanding for at least 90 days prior to sale	Six months for reporting issuers; one year for non-reporting issuers	Six months for reporting issuers; one year for non-reporting issuers

	Section 4(a)(1-1/2)*	**Section 4(a)(7)**	**Rule 144 (By a Non-Affiliate)**	**Rule 144 (By an Affiliate)**
Information Requirement	Varies; disclosure obligations may be dependent on seller's relationship to the issuer (e.g., insider or outsider) and whether public information is available concerning the issuer	For non-reporting issuers, specific information concerning the issuer and the securities, including the issuer's financial statements for non-reporting issuers	Current public information is required until a one-year holding period has been met	Current public information
Bad Actor Disqualifications	Not applicable	Neither seller nor anyone paid remuneration on sale may be subject to a bad actor disqualification	Not applicable	Not applicable
Manner of Sale	None	None	None	For equity securities, must be a broker's transaction, a transaction with a market maker or a riskless principal transaction

	Section 4(a)(1-1/2)*	**Section 4(a)(7)**	**Rule 144 (By a Non-Affiliate)**	**Rule 144 (By an Affiliate)**
Volume Limitation	None	None	None, but stock ownership could cause a person to become an affiliate	Limited
"Blue Sky" Laws	Not preempted by exemption	Preempted by exemption	Not preempted by exemption	Not preempted by exemption
Certification/ Filing Requirements	None	For non-reporting issuers, if seller is a control person, the seller must provide a certification of securities law compliance	None	Form 144 (if sales exceed 5,000 shares or $50,000)
Shell Company Status	Does not impact the availability of the exemption	Exemption requires the securities to be issued by an operating company	Exemption not available for securities of a shell company; securities of a former shell may be sold if the issuer complies with current public information requirements	Exemption not available for securities of a shell company; securities of a former shell may be sold if the issuer complies with current public information requirements

* The requirements for meeting the Section 4(a)(1-1/2) exemption may vary based upon facts and circumstances.

Ultimately, because securities resold pursuant to Section 4(a)(7) will be restricted securities, we expect that Rule 144 will remain the preferred approach for resale transactions when its conditions can be met. Where Rule 144 is unavailable, however, practitioners will have to weigh the pros and cons of Section 4(a)(1-1/2) and Section 4(a)(7) in order to determine which exemption is a better fit for the proposed transaction. Although Section 4(a)(7) provides statutory certainty in meeting its requirements, we expect that many practitioners are familiar and comfortable with meeting the requirements of the Section 4(a)(1-1/2) exemption and appreciate the flexibility provided by a principles-based exemption. Moreover, given Section 4(a)(7)'s information requirements for private company securities and the additional diligence necessary to ensure that the seller is not subject to a bad actor disqualification, it is likely that attempting to comply with Section 4(a)(7) will result in more legal expenses than complying with Section 4(a)(1-1/2).

While we think Section 4(a)(1-1/2) will continue to be the preferred resale exemption when Rule 144 is not available, there are a number of situations where Section 4(a)(7) may become the standard exemption. In industries where it is common to make equity a significant portion of employee compensation, for example, Section 4(a)(7) may prove to be useful in helping employees achieve liquidity in a stock prior to a company's initial public offering. In this circumstance, private companies could develop form Section 4(a)(7) disclosure documents to facilitate sales by their employees.

In addition, investors who frequently purchase restricted securities in private placements may also prefer the Section 4(a)(7) exemption when they want to resell securities that do not meet the holding period requirement under Rule 144. In the future, we expect that counsel to private investors will seek to negotiate, as part of an investor's purchase agreement, that an issuer must provide Section 4(a)(7) disclosure materials to the investor upon request. Accordingly, Section 4(a)(7) may be an attractive means of reselling securities to investors who prefer the assurance of a statutory exemption to the uncertainty inherent in the Section 4(a)(1-1/2) exemption.

NOTES:

[1]Before a final version of the FAST Act was signed into law, two separate versions were approved by the House of Representatives and the Senate, respectively. As a result, a conference committee was called to draft a compromise bill that both houses of Congress could accept. In its joint explanatory statement (the "***Explanatory Statement***"), the conference committee noted

that the portions of the FAST Act that amended federal securities laws were "derived from measures passed by the House on a bipartisan basis." 161 Cong. Rec. H8649, H8861(12). The Explanatory Statement also shows that the FAST Act's securities law riders were generally passed unanimously. *Id.*

[2]JUMPSTART OUR BUSINESS STARTUPS ACT, Pub. L. No. 112-106, § 108, 126 Stat. 306 (2012).

[3]U.S. SEC. & EXCH. COMM'N, REPORT OF DISCLOSURE REQUIREMENTS IN REGULATION S-K 22 (2013), https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

[4]*Id.*

[5]*See* FIXING AMERICA'S SURFACE TRANSPORTATION ACT, Pub. L. No. 114-94, §§ 72001 to 72003, 129 Stat. 1312 (2015).

[6]*Id.* § 72001.

[7]*Id.*

[8]SEC Release No. 34-77969 (June 1, 2016).

[9]*Id.*

[10]§ 72002, 129 Stat. at 1784–1785.

[11]*Id.*; *see also Recently Enacted Transportation Law Includes a Number of Changes to the Federal Securities Laws*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/corpfin/announcement/cf-announcement—-fast-act.html.

[12]*See* SEC Release No. 33-101110 (July 16, 2016).

[13]*Id.* § 72003(a).

[14]*Id.* § 72003(b).

[15]*Id.* § 72003(c).

[16]The staff of the Commission did not review subparts Regulation AB and Regulation M-A of Regulation S-K, finding that both subparts were adopted recently and were carefully tailored and relevant to specific types of registrants or transactions. *See Report on Review of Disclosure Requirements in Regulation S-K, supra* note 3, at 4.

[17]*Id.* at 3–4.

[18]*Id.* at 93.

[19]*Id.* at 93–94.

[20]*Id.* at 95–96.

[21]17 C.F.R. § 240.12b-2; 17 C.F.R. § 230.405 (2015).

[22]*See* Regulation S-K, Items 101, 301, 303, and 503 [17 C.F.R. § 229.101, 301, 303, 503]; *see also* Regulation S-X, Article 8 [17 C.F.R. § 210.8].

[23]General Instruction I.B.1 to Form S-3 [17 C.F.R. § 239.13]. A smaller reporting company may, however, use Form S-3 to register a primary offering if the value of securities to be sold is no more than one-third of the aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant. However, meeting this standard may be unworkable for an underwritten public offering in which a large number of securities are to be sold.

[24]*Id.*; *see also Compliance and Disclosure Interpretations: Securities Act Forms*, U.S. Securities and Exchange Commission, 116.12, https://www.sec.gov/divisions/corpfin/guidance/safinterp.htm (stating that quotation of a security on the OTC Bulletin Board or the Pink Sheets is insufficient to meet the requirements of General Instruction I.B.3.).

[25]*See, e.g.*, New York Stock Exchange Listed Company Manual, § 802.01C; NASDAQ Rule 5500(a)(2).

[26]*See, e.g.*, New York Stock Exchange Listed Company Manual, § 802.01C; NASDAQ Rule 5500(a)(2).

[27]Form S-3, Item 12 [17 C.F.R. § 239.13].

[28]*See Id.*

[29]SEC Release No. 33-10003, 9-10 (Jan. 13, 2016).

[30]FIXING AMERICA'S SURFACE TRANSPORTATION ACT, Pub. L. No. 114-94 § 84001, 129 Stat, 1312 (2015).

[31]Release No. 33-10003, *supra* note 29.

[32]*Id.*

[33]Form S-3, Item 12(b) [17 C.F.R. § 239.13].

[34]General Instruction VII to Form S-1 [17 C.F.R. § 239.11]. If the registrant is a successor entity, it shall be deemed to have met the first four requirements if (i) the registrant and its predecessor, taken together, meet such requirements; provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor or (ii) the predecessor met such requirements at the time of succession and the registrant has continued to do so since the succession.

[35]Form S-1, Item 12 [17 C.F.R. § 239.11].

[36]Release No. 33-10003, *supra* note 29.

[37]*See Compliance and Disclosure Interpretations*: *Securities Act Rules,* U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm (stating that a former shell company must meet the current public information requirements at the time of a resale pursuant to Rule 144 no matter how long the shares have been held). We expect that many smaller reporting companies that file resale shelf registration statements do so pursuant to a registration rights agreement that requires the smaller reporting company to keep a shelf registration statement effective registering the resale of securities originally issued in a private placement. However, registration rights agreements typically provide that a company's obligation to keep a registration statement effective ceases once the securities can be sold pursuant to Rule 144 promulgated under the Securities Act without volume or manner of sale restrictions and without the requirement for the company to be in compliance with current public information requirements. In most circumstances, these eligibility requirements are met after a security has been held for a year, and as a result we expect that the obligation of many smaller reporting companies to maintain effective resale shelf registration statements has been satisfied prior to the time that the interim final rules provided such companies with relief.

[38]Release No. 33-10003, *supra* note 29, at 6.

[39]*See* Baker & McKenzie (February 18, 2016); Davis Polk & Wardwell LLP

(February 18, 2016); Sullivan & Cromwell LLP (February 18, 2016); Ernst & Young LLP (February 18, 2016).

[40]*See, e.g.*, Davis Polk & Wardwell LLP (February 18, 2016).

[41]JUMPSTART OUR BUSINESS STARTUPS ACT, Pub. L. No. 112-106, 126 Stat. 306 (2012).

[42]15 U.S.C.A. § 77b(a)(19) (2014).

[43]*Id.*

[44]JUMPSTART OUR BUSINESS STARTUPS ACT, Pub. L. No. 112-106, 126 Stat. 306 (2012).

[45]*See Id.*

[46]*Id.*

[47]FIXING AMERICA'S SURFACE TRANSPORTATION ACT, Pub. L. No. 114-94, § 71001, 129 Stat. 1312 (2015).

[48]*Id.*; *Recently Enacted Transportation Law Includes a Number of Changes to the Federal Securities Laws,* U.S. Securities and Exchange Commission, https://www.sec.gov/corpfin/announcement/cf-announcement—-fast-act.html.

[49]Latham & Watkins LLP, The Jobs Act After One Year: A Review of the New IPO Playbook 9 (2013).

[50]17 C.F.R. § 230.401 (2015).

[51]*Jumpstart Our Business Startups Act Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act,* U.S. Securities and Exchange Commission, Question https://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.

[52]*Id.*

[53]§ 71002, 129 Stat. 1312.

[54]*Id.*

[55]*See JOBS Act FAQs, supra* note 51; 15 U.S.C.A. § 77e(d).

[56]*Id.*, Question 3.

[57]17 C.F.R. § 229.301 to 302 (2015).

[58]*Id.*

[59]15 U.S.C.A. § 77g(a)(2).

[60]FIXING AMERICA'S SURFACE TRANSPORTATION ACT, Pub. L. No. 114-94, § 71003, 129 Stat. 1312 (2015).

[61]Release No. 33-10003, *supra* note 29.

[62]*Compliance and Disclosure Interpretations: Fixing America's Transportation (FAST) Act*) [Hereinafter, *C&DI: Fast Act*], U.S. Securities and Exchange Commission, https://www.sec.gov/divisions/corpfin/guidance/fast-act-interps.htm.

[63]*Id.*, Questions 1–2.

[64]Section 85001 of the FAST Act.

[65]*Id.*; SEC Release No. 33-10075 (May 3, 2016).

[66]*C&DI: Fast Act, supra* note 62, at Questions 3–6.

[67]*See, e.g.,* Securities Act Release No. 6188 (1980) ("In making such private sales, the affiliates presumably would rely on the so-called Section '4[a](1-1/2)'

exemption. This is a hybrid exemption not specifically provided for in the 1933 Act but clearly within its intended purpose.”).

[68]FIXING AMERICA’S SURFACE TRANSPORTATION ACT, Pub. L. No. 114-94, § 76001, 129 Stat. 1312 (2015).

[69]*See* 15 U.S.C.A. § 77d(e)(2) (“The exemption provided by subsection (a)(7) shall not be the exclusive means for establishing an exemption from the registration requirements of Section 5.”).

[70]*Id.* § 77d(a)(1).

[71]*Id.* § 77d(a)(2).

[72]*Id.* § 77b(a)(11).

[73]The Section 4(a)(1-1/2) exemption may also be used in other cases in which Rule 144 does not apply, such as the limitation under Rule 144(i)(2) that securities issued by a shell company cannot be resold pursuant to Rule 144 unless the issuer, among other things, (i) is no longer a shell company, (ii) is subject to the reporting requirements of the Exchange Act and (iii) is current in its Exchange Act reporting requirements. 17 C.F.R. § 230.144(i)(2) (2015). As a result, security holders of a non-reporting former shell company are generally disqualified from relying on Rule 144 to resell their securities.

[74]*See, e.g.,* Release No. 6188, *supra* note 67. The Commission identified the exemption as Section 4(1-1/2), but we refer to the Section 4(a)(1-1/2) exemption herein due to the renumbering of Section 4 of the Securities Act by the JOBS Act.

[75]*See* The Corporate Counsel, Vol. XL, No. 6 (November — December 2015).

[76]H.R. Rep. No. 114-281 (2015); Jeff Butler, *Press Release, McHenry Praises House Passage of RAISE Act: Legislation will open secondary markets to entrepreneurs & investors,* U.S. Congressman Patrick McHenry, http://mchenry.house.gov/news/documentsingle.aspx?DocumentID=397997.

[77]*Id.*

[78]15 U.S.C.A. § 77d(d)(1).

[79]17 C.F.R. § 230.501(a) (2015).

[80]*Id.* § 77d(d)(2).

[81]The balance sheet is presumed to be reasonably current if it is as of a date less than 16 months before the transaction date, and the income statement is presumed to be reasonably current if it is for the 12 months preceding the date of such balance sheet. *Id.*

[82]*Id.* § 77d(d)(3).

[83]*Id.* § 77d(d)(4).

[84]*Id.* § 77d(d)(5).

[85]*Id.* § 77d(d)(6).

[86]15 U.S.C.A. § 77d(d)(7) (2014).

[87]*Id.* § 77d(d)(8).

[88]FIXING AMERICA’S SURFACE TRANSPORTATION ACT, Pub. L. No. 114-94, § 76001(b), 129 Stat. 1312 (2015).

[89]15 A. § 77r(b)(1).

[90]*Id.* § 77d(d)(1).

[91]*Id.* § 77d(d)(8).

[92]*Id.* § 77d(d)(5).
[93]17 C.F.R. § 230.506(d)(2)(iv) (2015).
[94]15 U.S.C.A. § 77d(d)(3)(K).
[95]*See* Marc I. Steinberg, Understanding Securities Law § 3.05 (6th ed. 2014).
[96]*See* 15 U.S.C.A. § 77d(d)(3).
[97]*Id.* § 77d(e)(1)(A).