



February 18, 2016

Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Attention: Mr. Brent J. Fields, Secretary

Re: Simplification of Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies

Dear Secretary Fields:

The Securities Industry and Financial Markets Association (“SIFMA”) is writing to respond to the invitation of the Securities and Exchange Commission (“Commission”) for public comment on the Interim Final Rules dated January 19, 2016 adopting interim final amendments applicable to certain forms. These amendments implement the provisions of the Fixing America’s Surface Transportation (“FAST”) Act that require the Commission (1) to revise Forms S-1 and F-1 to permit emerging growth companies (“EGCs”) to omit financial information for certain historical periods and (2) to revise Form S-1 to permit forward incorporation by reference for smaller reporting companies. We appreciate the opportunity to provide comments to the Commission on the amendments.

\*SIFMA brings together the shared interest of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit [www.sifma.org](http://www.sifma.org).

In this letter, we suggest that the Commission extend the accommodations provided to EGCs with respect to the ability to omit certain historical financial information from draft registration statements to all issuers and to other Securities Act of 1933, as amended (the “Securities Act”) forms. We also suggest allowing all issuers, and not only smaller reporting companies, to incorporate future filings by reference into Form S-1. Finally, we suggest a further simplification of the registration process as it relates to the use of Forms S-4 or F-4 to register so-called “A/B” (or “Exxon Capital”) exchange offers by Well-Known Seasoned Issuers (“WKSIs”).

### **1. EGC Financial Statements Accommodation**

The amendments addressing EGC financial statements permit EGCs to omit historical financial information for certain periods otherwise required by Regulation S-X under the Securities Act as of the time of a Form S-1 or F-1 filing or confidential submission, provided the issuer reasonably believes the information will not be required to be included at the time of the contemplated offering. This would allow an EGC, for example, to omit 2013 financial statements in a December 2015 filing if it does not intend to consummate the offering until its year-end 2015 audited financial statements are available (at which point 2014 and 2015, but not 2013, financial statements will be included in the registration statement).

We believe these amendments should be extended to apply to all issuers and to filings on all other Securities Act registration forms. While Regulation S-X requires the financial statement requirements set forth therein to be met at the time of a filing, and while we understand that it is the Commission’s policy not to review an incomplete filing, we believe the need to prepare an extra year of audited financial statements and related disclosure can often be burdensome. For issuers that do not already have audited financial statements for the required number of prior years, the time and expense involved in preparing each additional year is significant. We do not believe the limited benefit to investors from having an additional year of financial statements in a filing when ultimately those financial statements will not be part of the disclosure package on which an investment decision is based outweighs the burden to issuers of preparing them. Where financial statements of other entities (such as acquired entities) are required in registration

statements, the burdens associated with preparing audited financial statements, for example, for private company acquirers or carved-out businesses of another entity, are no less significant for non-EGC issuers than they are for EGC issuers. In those cases, the ability to prepare such financial statements may be largely out of the control of the issuer, regardless of whether it is an EGC. We also believe extending the accommodation to all issuers would reduce the burden on the staff by eliminating time unnecessarily spent on disclosure not ultimately included in the registration statement.

In addition, the accommodation is important because it eliminates an artificial blackout period and corresponding delay in the timing of offerings where issuers may be ready to file and begin the Commission review process (for example, in January for an issuer with a December fiscal year end) but for the fact that they must wait until the most recent year of financial statements is complete and audited (which could be until March or later) because they lack the earliest year that would have to be included if required at the time of filing. Extending the accommodation to all issuers and all forms would therefore provide all issuers with more flexibility to access the capital markets at optimal times.

## **2. Form S-1 Forward Incorporation for Smaller Reporting Companies**

The amendments revise Form S-1 to permit forward incorporation by reference for smaller reporting companies. We believe this permission should apply to filings by all issuers on Form S-1, subject to the same conditions applicable to smaller reporting companies, and not only to filings by smaller reporting companies. While the purpose of the amendment may have been to make the offering process easier for smaller reporting companies for which the time and expense associated with making additional filings may be more significant, we do not believe the benefit to investors in accessing information through an amendment or supplement to the original registration statement rather than through Exchange Act filings outweighs the burden of filing an amendment each time the registration statement needs to be updated. Importantly, the Commission in other contexts has granted accommodations eliminating procedural speed bumps (such as the ability to use Form S-3, into which issuers may forward incorporate) to larger, more established issuers because, among other things, they have a reporting history and are familiar to

the market. To allow only smaller reporting companies to forward incorporate into Form S-1 would be incongruous with other rules and forms. Further, we believe both issuers and investors would benefit from the consistency that would result from permitting all issuers to forward incorporate by reference into Form S-1.

### **3. Forms S-4 and F-4 and Automatic Effectiveness for WKSI Issuers**

In addition to the suggestions above, we suggest that the Commission consider revising Forms S-4 and F-4 to permit automatic effectiveness of such registration statements when used by issuers that are WKSIs (and would otherwise qualify for registration on Form S-3ASR or F-3ASR) for “A/B” or “Exxon Capital” exchange offers in which the issuer issues new registered securities in exchange for securities originally issued in a private placement, but with identical terms. These issuers are permitted to use automatically effective registration statements that do not benefit from Commission staff review to offer new securities, and we believe any risk to investors is in fact lower in A/B exchange offers because there is no investment decision involved. The fact that automatic effectiveness is not permitted for WKSIs in these cases is simply a speed bump we believe should be eliminated.

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If you have any questions regarding SIFMA’s views or require additional information, please do not hesitate to contact the undersigned at (212) 313-1118, or our counsel on this matter, Leslie N. Silverman of Cleary Gottlieb Steen & Hamilton at (212) 225-2380.

Very truly yours,



Sean Davy, Managing Director, Capital Markets Division  
Securities Industry and Financial Markets Association