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Simplification of Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies (Release No. 33-10003) Commission File No. S7-01-16

Dear Mr. Fields:

Ernst & Young LLP is pleased to comment on the *Simplification of Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies* interim final rules (the Rules) issued by the Securities and Exchange Commission (SEC or the Commission). The Rules implement certain provisions of the Fixing America's Surface Transportation (FAST) Act, which required the Commission to revise Forms S-1 and F-1 to permit an emerging growth company (EGC) to omit financial information for certain historical periods and Form S-1 to permit a smaller reporting company (SRC) to forward incorporate by reference.

Forward incorporation

With EDGAR and other information available on the internet, investors today can readily obtain the Exchange Act reports of all registrants, so expanding a registrant's ability to forward incorporate by reference seems timely and appropriate. However, in implementing Section 84001 of the FAST Act, the Rules restrict forward incorporation by reference to SRCs that are also eligible to backward incorporate by reference under General Instruction VII to Form S-1.

Among other things, General Instruction VII limits incorporation by reference to registrants that have filed an Exchange Act annual report for their most recently completed fiscal year. This eligibility condition effectively limits the ability of SRCs to use the statutory relief for a period that could exceed 12 months following their initial public offering (IPO). We question whether this result would be consistent with the intent of the legislation. Further, we question whether this long-standing "seasoning" requirement restricting the use of backward incorporation by reference by any registrant remains appropriate given the access to reports discussed above. Accordingly, we recommend that the Commission amend General Instruction VII to Form S-1 to remove item C and the related seasoning requirement. In our view, the other eligibility conditions of General Instruction VII to Form S-1 (e.g., current in Exchange Act reporting, not a blank check or shell company, not a penny stock offering or business combination transaction) should be sufficient to protect investors and appropriately limit incorporation by reference.

In addition, we note that Item 12(b) of Form S-1, as adopted in the Rules, limits forward incorporation to SRCs. This creates an anomaly in which a smaller public company could forward incorporate by reference into Form S-1, but a larger registrant would not be able to use forward incorporation until it

becomes eligible to use Form S-3. We therefore suggest that the Commission revise Item 12(b) of Form S-1 allow all registrants to use forward incorporation in an S-1, provided they meet the eligibility conditions of General Instruction VII.

Omission of unnecessary financial information

To implement Section 71003 of the FAST Act, we believe newly adopted General Instruction II.C to Form S-1 (and General Instruction II.E to Form F-1) should explicitly address interim financial information and the related disclosures required by Regulation S-K (e.g., Selected Financial Data, Management's Discussion and Analysis (MD&A)).

In December 2015, the SEC staff issued two compliance and disclosure interpretations to interpret Section 71003. The interpretations require an EGC's initial IPO filing or submission to include comparative interim financial statements for the current and previous fiscal year because financial statements for those fiscal periods ultimately would be required at the effective date of the IPO.

Section 71003 was intended to allow an EGC to file or submit its IPO registration statement with only one year of audited financial statements when it expects to update that registration statement with the subsequent year's audited financial statements before effectiveness. To protect investors, Section 71003 requires such updating prior to distribution of a preliminary prospectus. In this way, Section 71003 allows an EGC to avoid the time, expense and delay of preparing financial statements that will not be relied on by investors in making an investment decision.

While Section 71003 does not specifically address interim financial statements, it does allow the omission of "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 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." In our view the statutory language is open to reasonable interpretation.

Given that the intent of Section 71003 is clearly to provide relief to EGCs and not require them to prepare financial statements that will not be required in the effective IPO registration statement, it would seem that with respect to interim financial statements in the initial IPO filing or confidential submission the statutory language could be interpreted to require or permit any of the following:

- ▶ Comparative interim financial statements that meet the timeliness requirements of Regulation S-X at the time of the initial IPO filing or confidential submission (i.e., the SEC staff's view set forth in the C&DIs)
- ▶ Interim financial statements only for the year-to-date period of the current fiscal year if the audited annual financial statements for the current year are expected to be included in the effective IPO registration statement (i.e., not require comparative interim financial statements in the IPO filing or confidential submission but require timely financial information for more than the most recently completed fiscal year)

- ▶ Omission of financial information for interim periods that the registrant reasonably believes will not be required to be included in the Form S-1 or F-1 at its effective date (e.g., not require any interim financial statements in the IPO filing or confidential submission when it will be updated with audited financial statements for the most recently completed fiscal year as of the effective date)

The third alternative would be the least costly to an EGC. Given the investor protection provisions of Section 71003 that require such updating to occur before distribution of the preliminary prospectus to investors, the third alternative also would not appear to be detrimental to investors since all necessary information would be provided for purposes of making an investment decision. The only drawback would appear to be that more limited financial information would be available to the SEC staff to review. If the Commission finds this concern compelling, the second alternative would appear to satisfy that concern without imposing the additional costs to an EGC of complying with the SEC staff's C&DI.

Given the objective of Section 71003 to allow EGCs to omit information that ultimately will not be required at the time of the registered offering, it would seem reasonable to allow EGCs to omit interim financial information if it will not be required at effectiveness. For the same reasons, we also believe the Commission should clarify that selected financial data, MD&A and pro-forma financial information for such interim periods may be omitted from the initial IPO filing or confidential submission. For example, the Commission should allow an EGC's initial IPO filing or confidential submission to omit pro-forma financial information for the prior fiscal year when pro forma financial information only will be required for the most recently completed year as of the effective date (e.g., because the registration statement will be updated to include audited financial statements of the fiscal year that includes the date of an acquisition).

Other conforming changes

We also recommend that the Commission conform the requirement under Regulation A (Reg A) that a registrant make a public filing of an offering statement 21 days before qualification with the FAST Act provision that allows an EGC to publicly file an IPO registration statement 15 days before its roadshow.

Both of these time limits aim to provide potential investors with enough time to make informed investment decisions. It appears the Commission intentionally aligned these time frames when it recently amended Reg A. Therefore, it would be reasonable for the SEC to conform Reg A to the FAST Act's shortened EGC public filing period of 15 days.

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We would be pleased to discuss our comments with the Commission or its staff at your convenience.

Very truly yours,

