

February 2016

SECURITIES LAW ALERT

SEC ADOPTS NEW RULES TO FACILITATE SECURITIES OFFERINGS BY EMERGING GROWTH COMPANIES AND SMALLER REPORTING COMPANIES

In January 2016, the Securities and Exchange Commission ("SEC") approved new rules implementing two provisions of the Fixing America's Surface Transportation (FAST) Act, adopted by Congress in December, that will facilitate public offerings by emerging growth companies and smaller reporting companies.

The new rules allow a category of issuer known as an "emerging growth company"¹ that is filing a registration statement (or submitting a draft registration statement for confidential review) on Form S-1 or Form F-1 (for foreign private issuers) to omit financial information for historical periods otherwise required to be included in such forms so long as the issuer amends the registration statement prior to distributing a preliminary prospectus to include all financial information required by Regulation S-X at the time of the amendment. This rule change will allow an emerging growth company to avoid the cost and delay of having to provide certain historical financial information as part of the initial filing process.

In addition, the new rules permit a separate category of issuer known as a "smaller reporting company"² to incorporate by reference into its registration statement on Form S-1 (but not Form F-1) any documents filed by the issuer subsequent to the effective date of the registration statement. Incorporation by reference of subsequently filed SEC reporting documents will eliminate the need, in most cases, to update information in a Form S-1 that has become stale or is incomplete by the filing of a prospectus sticker or post-effective amendment. This should significantly reduce the time and cost of continuous securities offerings on Form S-1 and will provide smaller reporting companies with an advantage that currently is available only to issuers that qualify for use of a short form registration statement on Form S-3.

In order to be eligible to use forward incorporation by reference, a smaller reporting company will be required to be current in its SEC reporting obligations by having filed (a) an annual report for its most recently completed fiscal year and (b) all required Exchange Act reports and materials during the 12 months immediately preceding filing of the Form S-1 (or such shorter period that the smaller reporting company was required to file such reports and materials).

Smaller reporting companies that are blank check companies, shell companies (other than business combination related shell companies) or issuers for offerings of penny stocks will not be permitted to forward incorporate by reference into a Form S-1.

¹ An "emerging growth company" is defined in Section 2(a)(19) of the Securities Act of 1933, as amended (the "Securities Act") to mean an issuer with less than \$1 billion in total annual gross revenues during its most recently completed fiscal year. If an issuer qualifies as an emerging growth company on the first day of its fiscal year, it maintains that status until the earliest of the last day of the fiscal year of the issuer during which it has total annual gross revenues of \$1 billion or more; the last day of its fiscal year following the fifth anniversary of the first sale of its common equity securities pursuant to an effective registration statement; the date on which the issuer has, during the previous 3-year period, issued more than \$1 billion in non-convertible debt; or the date on which the issuer is deemed to be a "large accelerated filer" (as defined in Rule 12b-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act")).

² A "smaller reporting company" is defined in Rule 405 under the Securities Act to mean an issuer that had a public float of less than \$75 million as of the last business day of its most recently completed second fiscal quarter or had annual revenues of less than \$50 million during its most recently completed fiscal year for which audited financial statements are available.

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In addition, the ability to forward incorporate by reference will be conditioned on the smaller reporting company making its incorporated periodic reports and other materials readily available and accessible on a web site maintained by or for the issuer and disclosing in the prospectus that such materials will be provided upon request.

We are available to provide counsel concerning these issues, as well as related corporate or securities law issues. For additional information, please contact one of the attorneys named below or the attorney with whom you have a primary relationship.

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