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November 1, 2016

By Email

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: **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; File No. S7-01-16**

Dear Mr. Fields:

We are submitting this letter in response to a request for comment by the Securities and Exchange Commission (the "Commission") on whether the interim final rules adopted in the above-referenced release should be extended to other registrants or forms. We are also submitting comments on other aspects of the interim final rules, as requested by the Commission.

For the reasons set forth below, we believe that the Commission should permit issuers registering offers and sales of securities on Form S-11 to incorporate by reference filings made with the Commission after the effective date of the registration statement (i.e., forward incorporation by reference). We also believe that the Commission should revise Form S-1 and Form S-11 to modify the current requirement in General Instruction VII.C and General Instruction H.3, respectively, that requires an issuer to have filed the annual report required under Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") for its most recently completed fiscal year. We do not recommend, however, that the modified instruction serves as a condition to the ability of an issuer to forward incorporate by reference under either Form S-1 or Form S-11.

Forward Incorporation by Reference in Form S-11

In adopting Section 84001 of the Fixing America's Surface Transportation Act, Congress appeared to have developed the idea for forward incorporation by reference from a recommendation by the Commission's 2012 Government-Business Forum on Small Business Capital Formation (the "Small Business Forum").[1] Given the origination of the concept from the Small Business Forum, it is not surprising that Congress, in drafting Section 84001, referenced only smaller reporting companies and no other issuers. In recommending its proposal to permit forward incorporation by reference, the Small Business Forum noted that investors could now

[1] *See* H.R. Rep. No. 114-201, at 2 (2015); *see also* Thirty First Annual SEC Government-Business Forum on Small Business Capital Formation Final Report, Nov. 15, 2012, at 26 and 31.

easily access a company's Exchange Act filings that would be incorporated by reference into the Form S-1 through the Commission's EDGAR system or the Internet.[2] That same rationale applies equally to an issuer filing a Form S-11, as its Exchange Act filings would also be available through the Commission's EDGAR system and its website.

When the Commission permitted issuers filing a Form S-11 to incorporate by reference filings made with the Commission prior to the effective date of the registration statement (i.e., backward incorporation by reference), it stated that the following:

> Form S-11 should be consistent with Form S-1 with respect to incorporation by reference. Both Form S-11 and Form S-1 are long-form registration statements intended for new and unseasoned issuers. The only substantive difference between the two forms is that Form S-11 contains certain additional disclosure requirements specific to real estate entities. We believe that integrating disclosure under the Exchange Act and Securities Act should extend equally to the disclosure obligations of real estate entities.[3]

While we recognize that Form S-1, at the time, did not permit forward incorporation by reference, we see no reason for why the Commission's rationale set forth above should not equally apply to both backward and forward incorporation by reference now that Form S-1 permits forward incorporation by reference (at least with respect to smaller reporting companies). We recommend that the Commission permit all issuers filing a Form S-11 to forward incorporate by reference but believe that the ability to forward incorporate by reference should be expanded to cover, at a minimum, smaller reporting companies filing a Form S-11.

We believe that a significant amount of offers and sales of securities registered on Form S-11 are by non-traded real estate investment trusts ("REITs").[4] For non-traded REITs, the ability to forward incorporate by reference on Form S-11 is particularly significant due to the fact that it does not have any public float and is ineligible to conduct primary offerings on Form S-3 pursuant to General Instructions I.B.1 or I.B.6 of that form.[5] Accordingly, unlike other issuers, non-traded REITs will not have the opportunity to publicly raise capital[6] utilizing a registration

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[2] *Id*.

[3] Section I.A to Release 33-8909 (April 10, 2008).

[4] According to information compiled by Robert A. Stanger & Co., Inc. ("Stanger"), non-traded REITs raised nearly $10 billion as part of public direct investment programs in 2015. Also according to Stanger, as of June 30, 2016, there were 41 closed non-traded REITs and 21 effective non-traded REITs .

[5] *See* footnote 34 to Release 33-8812 (June 20, 2007).

[6] We recognize that a non-traded REIT could use Form S-3 pursuant to General Instruction I.B.4 and issue securities pursuant to its dividend reinvestment plan, but we do not consider those issuances to constitute public capital raisings like offerings pursuant to General Instruction I.B.1 or I.B.6.

statement that permits forward incorporation by reference unless Form S-11 is revised to permit it.

Permitting issuers on Form S-11 to forward incorporate by reference would significantly reduce costs associated with the preparation and filing of prospectus supplements and post-effective amendments. The amount of information available to investors would not change materially, if at all, because all information that would otherwise be contained in a prospectus supplement or post-effective amendment can be included in issuers' Exchange Act filings. If the Commission permits Form S-11 to incorporate by reference those filings, then investors will be provided with the same level of information while costs to issuers will be significantly reduced.

General Instruction VII.C to Form S-1 and General Instruction H.3 to Form S-11

General Instruction VII.C to Form S-1 and General Instruction H.3 to Form S-11 contain the same requirement that the issuer must have filed its annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year to be eligible to incorporate by reference. This requirement effectively creates a blackout period, with respect to incorporation by reference, for an issuer filing a Form S-1 or Form S-11 between the end of its fiscal year and its Form 10-K filing. For example, an issuer with a December 31 fiscal year end filing a Form S-1 or Form S-11 on January 15 cannot incorporate by reference even if it has timely filed all of its Exchange Act reports for the past twelve months and its Form 10-K for the most recently completed fiscal year is not yet due.

With respect to Form S-1, the Commission adopted this requirement as part of Securities Offering Reform. Both the proposing and adopting releases stated that the Commission's intent was to permit backward incorporation by reference by "a reporting issuer that has filed at least one annual report."[7] Instruction VII.C, however, does not reflect the limited scope of this intention, as it requires the issuer to have filed the annual report for its most recently completed fiscal year, rather than just one annual report.

With respect to Form S-11, in the adopting release adding Instruction H.3, the Commission acknowledged the request of one commenter to revise the instruction to reflect the Commission's intention that the issuer is required to have filed at least one annual report, but not necessarily the annual report for its most recently completed fiscal year.[8] However, the Commission stated that it would not make the revision because its purpose for that rulemaking was to conform the incorporation by reference requirements of Form S-11 to that of Form S-1.[9]

[7] *See* Section V.B.3.b.i of Release 33-8501 (November 3, 2004) and Section V.B.3.b.i of Release 33-8591 (July 19, 2005).

[8] *See* Section I.C of Release 33-8909 (April 10, 2008).

[9] *Id*.

We believe that the interim final rules provide the Commission with an opportunity to revise and conform Instruction VII.C to Form S-1 and Instruction H.3 to Form S-11 to reflect the Commission's intent with respect to eligibility for *backward* incorporation by reference.[10] However, we do not believe that the instructions, as revised, should apply to determining whether an issuer is eligible to *forward* incorporate by reference.

As the Commission has indicated, Form S-1 and Form S-11 are intended for new issuers.[11] Accordingly, Form S-1 or Form S-11 is often the first filing that an issuer makes with the Commission, and the issuer may not even have had the opportunity to file at least one annual report. The offering registered by that first filing may be a continuous offering pursuant to Rule 415(a)(1)(ix) under the Securities Act of 1933 and may continue for more than one year. During this time, an issuer will likely make many Exchange Act filings, including many filings before it files its first annual report. As indicated in the interim final rules[12] and above, the ability of an issuer to forward incorporate by reference those filings, rather than filing prospectus supplements and post-effective amendments containing the same information, provides many benefits to the issuer and does not decrease the amount of information available to investors. While the Commission may have intended for issuers desiring to backward incorporate by reference to have filed at least one annual report, we do not believe that the Commission has expressed that intent with respect to forward incorporation by reference and also do not believe that the rationale of such a requirement applies to forward incorporation by reference.

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We welcome the opportunity to discuss our comments with the Commission or its staff. If you have any questions, please feel free to contact Peter M. Fass at [redacted] or Michael J. Choate at [redacted].

Respectfully submitted,

Proskauer Rose LLP

Proskauer Rose LLP

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[10] While we recognize that the Commission appears to have intended for an issuer to have filed at least one annual report to be eligible to backward incorporate by reference in Form S-1 and Form S-11, we encourage the Commission to also consider eliminating this requirement. Even if an issuer has not filed its first annual report, the Exchange Act filings that it will have made will be available on EDGAR, and we believe that the electronic availability of those filings is sufficient to permit an issuer to incorporate by reference the information into its Form S-1 or Form S-11.

[11] *See* accompanying text to note 2, *supra*.

[12] *See* Section IV.B of the interim final rules.