New York
Menlo Park
Washington DC
São Paulo
London
Paris
Madrid
Tokyo
Beijing
Hong Kong

Davis Polk

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

212 450 4000 tel
212 701 5800 fax

February 18, 2016

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**

VIA E-MAIL: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Mr. Fields:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission for comments on whether the interim final rules it has adopted to implement Sections 71003 and 84001 of the Fixing America's Surface Transportation ("**FAST**") Act, which revise financial reporting forms for emerging growth companies ("**EGCs**") and smaller reporting companies ("**SRCs**"), should be expanded to include other registrants or forms. We appreciate the opportunity to provide our perspective on these important topics.

We believe the statutory mandates of FAST Act Sections 71003 and 84001—which provide scaled disclosure relief for EGCs that file Forms S-1 and F-1 and for SRCs that file Form S-1 and elect to use forward incorporation by reference—represent sensible improvements to our registration regime that should enhance capital formation by reducing regulatory burdens, without compromising critical investor protections. To build on these improvements, we recommend that the Commission consider extending this relief to a larger group of registrants and additional form types. The practical effect of such changes, in our view, would be to make the public offering process more time- and cost-efficient for a broader class of issuers, without adversely impacting the quantity and quality of public disclosure available to investors. We present our specific recommendations below.

1. **We believe the Commission should consider extending the ability of EGCs to omit certain historical financial statements from pre-IPO registration statements to *all* IPO issuers, and to certain other issuers and pre-effective registration statements.**

Pursuant to Section 71003 of the FAST Act, the Commission has revised its rules and forms to allow EGCs to omit certain historical financial statements required under Regulation S-X from their pre-IPO registration statement if they reasonably believe the omitted information will not be required to be included in the filing at the time of the contemplated offering, so long as they amend the registration statement prior to distributing a preliminary prospectus to include all required financial information at the time of the amendment. This provision permits EGCs to avoid incurring the significant effort and expense of preparing audited financial statements (and related narrative disclosures) for past fiscal years that will not be included in the prospectus distributed to investors.

This change should result in substantial cost savings for many EGCs and may also shorten the time required for EGCs to prepare their registration statements, begin the Commission review process and ultimately come to market. In addition, to the extent EGCs have sensitive or proprietary data in their historical financial information, they may be able to protect their competitive position by not having to publicly disclose information beyond that which they reasonably expect will be required at the time they are marketing their IPO. While investors will not have access to any omitted financial information, such information will not be used to market and price the offering. EGCs ultimately will have to provide two years of audited financial statements, and the older information omitted at the outset of the process will be replaced with updated information, ensuring that at the time of the offering investors will have access to the most recent financial information available on which to base their investment decision.

Given the compliance burdens and costs, and potential filing delays, for IPO issuers associated with preparing and filing audited financial statements (and related narrative disclosures) that will not be included in any prospectus used for investment decision-making, we believe the ability of EGCs to omit certain historical financial statements from pre-IPO registration statements should be extended to *all* issuers undertaking an IPO. These burdens, costs and delays are even more consequential in the case of larger, more complex companies that must provide three years of financial statements (in which case the omitted financials would be financial statements for a period that is the fourth complete fiscal year before an offering date) and are not outweighed, in our view, by any incremental informational benefit to investors the omitted financial statements (which are not required to be distributed to investors) may provide. We note that securities regulators in other jurisdictions, including the UK Financial Conduct Authority and the Hong Kong Securities and Futures Commission, currently permit a similar approach.

For the same reasons, we believe this accommodation should also be extended to (i) all issuers (EGCs and non-EGCs) that will become subject to Securities Exchange Act of 1934 reporting requirements other than by conducting an IPO, such as through debt exchange offers on Form S-4 or spin-off transactions on Form 10, and (ii) existing registrants (EGCs and non-EGCs) that are required to include in registration statements financial statements of other entities, such as acquired or soon-to-be acquired businesses (for example, acquisitions that exceed 50% significance; individually insignificant acquisitions that exceed 50% aggregate significance) or private target companies in stock-for-stock merger transactions registered on Form S-4.

We believe these changes would result in a more consistent and cohesive set of streamlined financial reporting requirements, which, by reducing cost and complexity and enhancing

flexibility, would improve efficiency in capital formation for a broader range of issuers, without reducing the actual level of required disclosure to investors.

2. We believe the Commission should consider extending the ability to use forward incorporation by reference on Form S-1 to *all* issuers, regardless of public float.

Pursuant to Section 84001 of the FAST Act, the Commission has revised its rules and forms to permit SRCs to automatically update information in a Form S-1 registration statement after effectiveness by allowing forward incorporation by reference of subsequent Exchange Act reports (a benefit previously afforded only to larger companies eligible to use Form S-3). The ability to forward incorporate by reference eliminates the need for SRCs to file multiple prospectus supplements or post-effective amendments (which can be costly and time-consuming to prepare and are potentially subject to Commission review) to reflect developments already disclosed in their Exchange Act reports, which are on file and readily available and accessible to investors on EDGAR. This change will significantly simplify and streamline the process for SRCs to maintain current shelf registration statements on Form S-1 covering resale transactions under Securities Act of 1933 Rule 415(a)(1)(i), continuous primary offerings under Rule 415(a)(1)(ix) and other eligible securities offerings, which often require frequent informational updates, thereby enabling SRCs to take advantage of market opportunities more nimbly and at a lower cost. Investors, for their part, will continue to have access to the exact same quantity and quality of public disclosure, but will obtain updated information through issuers' Exchange Act filings rather than through prospectus supplements and post-effective amendments.

Given the ubiquity of the Internet, the advanced state of the Commission's EDGAR database and the overall ease, speed and reliability of procuring corporate disclosure filings online (including via issuers' websites), we believe the ability to utilize forward incorporation by reference for Form S-1 registration statements should be extended to *all* issuers, regardless of public float. Duplicative disclosure and dissemination requirements are expensive, burdensome and inefficient for all issuers, not just smaller issuers, and reducing redundancy benefits investors. Ensuring investors get the material information they need to make informed investment decisions without repetitive and unnecessary disclosures (which add to the length and complexity of Commission filings without any clear corresponding benefit to, and possibly to the detriment of, investors) is also a core objective of the Commission's ongoing disclosure effectiveness initiative.

Moreover, there does not appear to be any compelling basis for limiting this accommodation to the smallest class of issuers in the Commission's reporting regime. On the contrary, because larger issuers are likely to have greater market exposure relative to SRCs, their use of forward incorporation by reference would seem to pose less of a risk from an investor protection standpoint than its use by a class of issuers less widely followed by the marketplace. In any case, as noted in the request for comment, the Commission has attempted to address concerns that issuers' use of forward incorporation by reference could compromise investor access to material information by requiring that only issuers with a demonstrated ability to comply with Exchange Act reporting requirements be eligible to forward incorporate, as evidenced by such issuers' being current in their filing requirements. We believe that expanding this accommodation to include larger registrants would, by lowering compliance burdens and costs, promote more efficient access to the capital markets for a broader range of issuers, without reducing the overall level of public disclosure available to investors.

* * *

We appreciate the opportunity to respond to the Commission's request for comment and would be pleased to discuss our comments or any questions the Commission or its staff may have, which may be directed to Joseph A. Hall, Michael Kaplan, Richard D. Truesdell, Jr. or Michele Luburich of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP