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SEC Staff Issues Guidance on the Recent Changes to the JOBS Act

On Thursday, December 10, 2015, the staff of the SEC's Division of Corporation Finance (the "Staff") issued a [statement](#) and [two C&DIs](#) related to the recent changes to the JOBS Act contained in the [FAST Act](#) that we summarized in our [client publication last week](#).

As discussed in our previous publication, one of the changes in the FAST Act was the addition of a provision allowing EGCs to omit certain financial information included in the registration statement. Specifically, the change allows an EGC to avoid the cost of preparing, auditing and filing financial information relating "to a period that the issuer reasonably believes will not be required to be included in the [registration statement] at the time of the contemplated offering." Under the new legislation, an issuer that expects to market its IPO during 2016 on the basis of audited financial statements for 2015 could commence the SEC review process in 2015 or early 2016 without ever having to prepare audited financial statements for 2013. The two C&DIs specifically address the Staff's position on this statutory change, as follows:

- ***Interim Financial Information May Not Be Omitted***. The Staff interpreted the statutory change narrowly and will not allow an EGC to omit interim financial information even though such interim financial information will reasonably be expected to be superseded by annual or interim financial information that will be included in the registration statement at the time of the contemplated offering. The Staff explained that "interim financial information 'relates' to both the interim period and to any longer period (either interim or annual) into which it has been or will be included." For example, according to the Staff's interpretation:
 - A calendar year-end EGC that submits or files a registration statement in December 2015 and reasonably expects to commence its offering in April 2016 when annual financial statements for 2015 and 2014 will be required cannot omit its nine-month 2014 and 2015 interim financial statements because those statements include financial information that "relates" to annual financial statements that will be required at the time of the offering in April 2016. However, the EGC may omit from its December 2015 submission or filing its 2013 annual financial statements.
 - A calendar year-end EGC that submits or files a registration statement in June 2016 and reasonably expects to commence its offering in October 2016 when six-month interim financial statements will be required cannot omit its three-month interim financial statements because those statements "relate" to the longer six-month interim period for which interim financial statements will be required at the time of the offering in October 2016.
- ***Acquired Business Financial Statements May Be Omitted***. The Staff clarified that the statutory change permitting the omission of financial information relating to periods that are not expected to be included at the time of the offering is not limited to financial statements of the issuer. Therefore, an EGC may omit S-X Rule 3-05 financial statements of an acquired business if the EGC reasonably believes those financial statements will not be required at the time of the contemplated offering. Specifically, such separate financial statements would not

be required at the time of the offering if sufficient time has elapsed since the acquisition and such acquired business has been part of the issuer's financial statements for a sufficient amount of time. Whether a sufficient amount of time has elapsed to obviate the need for separate acquired business financial statements is a fact-specific inquiry and depends on the significance of the acquisition. See Section 2030.4 of the SEC's Division of Corporation Finance's Financial Reporting Manual for further detail.

The Staff noted that, although the above provisions will become effective on January 4, 2016, it would not object if EGCs apply this provision immediately.

Finally, the Staff's statement clarifies that the following changes are not self-executing and rulemaking will be required to implement them:

- **Summary Page for Form 10-K.** Section 72001, which will permit issuers to include a summary page in their annual reports filed on Form 10-K, will require rulemaking. The Staff noted that, although issuers are not currently prohibited from including such summary in an annual report on Form 10-K provided the summary fairly represents the material information in the report, the FAST Act adds the requirement that each item in the summary include a cross-reference to the material in the Form 10-K. Rulemaking will be required to implement this provision.
- **Incorporation by Reference for Smaller Reporting Companies.** To permit smaller reporting companies to use forward incorporation after the effectiveness of a registration statement on Form S-1, the SEC will need to engage in rulemaking to implement this provision.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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