

Client Alert

January 2016

SEC APPROVES TWO NEW RULES TO MAKE PUBLIC OFFERINGS MORE EFFICIENT

The SEC embraces regulatory simplification mandated by the FAST Act with two new rules that address the timing and cost challenges faced by smaller publicly traded companies.

On January 13, 2016, the SEC approved two interim final rules (that become effective when published in the Federal Register later in February) that are of significance for emerging growth companies (EGCs) and smaller reporting companies (SRCs). These rules were previously adopted by Congress in December 2015 (see our December 2015 Client Alert [here](#)).

Revisions to Forms S-1 and F-1 to Permit EGCs to Omit Financial Information for Certain Historical Periods. The first rule allows an EGC that is filing a registration statement (or submitting a draft registration statement for confidential review) on Form S-1 or F-1 to omit financial information for historical periods otherwise required by Reg. S-X if it reasonably believes the omitted information will not ultimately be required to be included in the filing at the time of the contemplated offering. In exchange for the SEC's expedited review, the issuer may not distribute a preliminary prospectus for the offering until the registration statement has been amended to include the omitted financial information. This rule is particularly important for calendar/fiscal year issuers scheduled to launch their IPOs in February through May, which are likely not to need an audit for the second preceding fiscal year at the time of the initial filing as financial statements for that year will be replaced later by those for the recently completed fiscal year.

Revisions to Form S-1 to Permit Forward Incorporation by Reference for SRCs. The second rule permits an SRC to incorporate by reference into its registration statement on Form S-1 documents filed by the issuer subsequent to the effective date of the registration statement in compliance with certain provisions of the Exchange Act. To be eligible to use forward incorporation by reference for periodic and current reporting requirements (i.e., Forms 10-K, 10-Q, 8-K) and proxy statement requirements, SRCs

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will have to meet the same requirements that currently apply to any issuer to use historical incorporation by reference on Form S-1, specifically, SRCs would be required to be current by having filed (a) an annual report for its most recently completed fiscal year and (b) all required Exchange Act reports during the 12 months immediately preceding filing of the Form S-1 (or any shorter period that the SRC was required to file such reports). SRCs that are blank check companies, non-business combination shell companies or issuers for offerings of penny stocks, however, are not permitted to forward incorporate by reference into a Form S-1. To forward incorporate by reference, the SRC is required to make its incorporated Exchange Act reports readily accessible on a website maintained by the issuer and disclose in the prospectus that such reports will be provided upon request. This rule is particularly important for SRCs registering securities following a private placement with registration rights requiring an effective registration for multiple years, such as while warrants are outstanding.

Takeaways for Smaller Publicly-Traded Companies: These two new rules should make the public offering process more efficient for issuers. With IPOs, whole fiscal years will not need to be audited if they are not ultimately required to be included in the prospectus to market and close the offering. And, after becoming public, eligible issuers' resale registration statements will not need to be separately updated any longer because subsequently-filed, readily-accessible periodic and current reports will serve that purpose.

Please feel free to contact the Olshan attorney with whom you regularly work or either of the attorneys listed below if you would like to discuss this matter.

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