

“Emerging Growth Company” Transition and Compliance After Loss of Status

Introduction

Title I of the JOBS Act, which was effective as of April 5, 2012 (JOBS Act), created a new category of issuers called “emerging growth companies, or EGCs” whose financial reporting and disclosure requirements in certain areas differ from other categories of issuers. The JOBS Act created the EGC designation as a way to ease small companies into the public markets and temporarily shield them from the full accounting and disclosure regime that accompanies SEC registration. The Fixing America’s Surface Transportation (FAST) Act, enacted on December 4, 2015, amended certain of the requirements that apply to EGCs.

An EGC¹ is a company that had total annual gross revenues of less than \$1.235 billion during its most recently completed fiscal year.² There are a number of different disclosure, accounting and other requirements for EGCs under both the Securities Act and the Exchange Act.³ Further, under the Exchange Act, an EGC may take advantage of certain reduced requirements, including that it:

- is not required to file an auditor’s report attesting to the effectiveness of the company’s internal control over financial reporting in an annual report on Form 10-K or Form 20-F;
- is not required to comply with the requirements on (1) “say-on-pay” and “say-on-frequency” votes in Rule 14a-21(a) and (b); (2) shareholder approval of golden parachute compensation in Rule 14a-21(c); and (3) pay ratio disclosure in Item 402(u) of Regulation S-K; and
- may comply with the smaller reporting company version of Item 402 of Regulation S-K (which permits, among other things, the omission of a Compensation Discussion and Analysis and requires executive compensation disclosure for the two, not three, most recently completed fiscal years), even if it does not qualify as a smaller reporting company.

Loss of Emerging Growth Company Status

A company that meets the definition of “emerging growth company” as of the first day of a fiscal year retains this status until the earliest of:

- the last day of the fiscal year during which it had total annual gross revenues of \$1.235 billion or more;

¹ Investment companies and issuers of asset-backed securities cannot qualify as EGCs, while foreign private issuers and business development companies can qualify if they meet the conditions. The Securities and Exchange Commission’s (SEC) Division of Corporation Finance (CF) issued a number of FAQs on Title I of the Jumpstart Our Business Startups Act (JOBS Act) FAQs) that provide guidance on the definition of “emerging growth company” and related issues. See [Jumpstart Our Business Startups Act, Frequently Asked Questions - Generally Applicable Questions on Title I of the JOBS Act \(sec.gov\)](#).

² See Securities Exchange Act of 1934, as amended (Exchange Act) Section 3(a)(80) and Rule 12b-2; Securities Act of 1933, as amended, (Securities Act) Section 2(a)(19) and Rule 405. The SEC is required, pursuant to the statutory definition, to index for inflation the revenue amount used to determine emerging growth company status every five years. See Securities Act Release No. 10332 (Mar. 31, 2017).

³ CF’s Financial Reporting Manual (FRM) includes guidance on EGC status and the scaled disclosure provisions applicable to these companies. See [CF Full FRM Update \(sec.gov\)](#).

- the last day of the fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the company in a registered offering under the Securities Act;⁴
- the date on which the company has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; or
- the date on which the company is deemed to be a “large accelerated filer.”

Transition and Compliance Dates

Once a company loses its status as an EGC, it must comply with the disclosure requirements applicable to companies other than EGCs beginning with its next periodic report. The table below provides examples of transition and compliance dates.

| DISQUALIFYING CONDITION (DECEMBER 31 FISCAL YEAR END) | DATE ON WHICH THE COMPANY WOULD CEASE TO BE AN EMERGING GROWTH COMPANY⁵ | FIRST PERIODIC REPORT THAT MUST COMPLY WITH ALL REQUIREMENTS APPLICABLE TO NON-EGCS |
|---|---|---|
| The company had total gross annual revenues of \$1.235 billion or more for its fiscal year ended December 31, 2023. | December 31, 2023 | Form 10-K for the fiscal year ended December 31, 2023 (which should also include auditor’s attestation report pursuant to Item 308(b) of Regulation S-K). |
| The company first sold its common equity securities in a registered offering in May 2018. | December 31, 2023 | Form 10-K for the fiscal year ended December 31, 2023 (which should also include auditor’s attestation report pursuant to Item 308(b) of Regulation S-K, unless the company is an accelerated filer). |
| The company issued more than \$1 billion in nonconvertible debt between June 1, 2020 and May 31, 2023. | May 31, 2023 | Form 10-Q for the quarter ended June 30, 2023. |
| The company is deemed to be a large accelerated filer as of December 31, 2023. | December 31, 2023 | Form 10-K for the fiscal year ended December 31, 2023 (which should also include auditor’s attestation report pursuant to Item 308(b) of Regulation S-K). |

⁴ “First sale of common equity securities” is not limited to a company’s initial primary offering of common equity securities for cash. It could also include registered offerings of common equity pursuant to an exchange offer, merger, employee benefit plan on a Form S-8, and selling shareholder’s secondary offering on resale registration statements. See FRM 10110.3.

⁵ This assumes that none of the other disqualifying conditions have been earlier triggered.

When an EGC loses its EGC status, it must begin to comply with all generally applicable SEC requirement:

- **Total Annual Gross Revenues Exceeds \$1.235 billion**

An EGC will become a non-EGC on the last day of its fiscal year that its total annual gross revenues exceed \$1.235 billion. For example, a calendar year-end company whose total annual gross revenues exceed \$1.235 billion on October 31, 2023 (or at any time during 2023) would cease to be an EGC on December 31, 2023.⁶ Therefore, compliance with non-EGC disclosure requirements will commence at the first periodic report thereafter, which would be the annual report Form 10-K for the year ending December 31, 2023.

- **Last Day of Fiscal Year Following 5th Anniversary of First Sale**

This date is determined by looking to the fiscal year during which the fifth anniversary occurs. The last day of this fiscal year will be the first day that the issuer is a non-EGC, provided no other disqualifying provisions have been triggered at an earlier date.⁷ For a calendar year-end company, if the fifth anniversary was May 2, 2023, the EGC would lose its EGC status on December 31, 2023. Therefore, compliance with non-EGC disclosure requirements will commence at the first periodic report thereafter, which would be the annual report Form 10-K for the year ending December 31, 2023.

- **Third Anniversary of Issuing More Than \$1 billion in Non-Convertible Debt**

An EGC will become a non-EGC on the date on which it has issued more than \$1 billion in non-convertible debt in the previous three years. For purposes of assessing the amount of non-convertible debt securities issued as of any date, an issuer should look at the immediately preceding rolling three-year period. That is, an issuer should not look at non-convertible debt issued in relation to fiscal or calendar years. All non-convertible debt securities issued over the prior three-year period, whether outstanding or not, are required to be counted against the \$1 billion debt limit.

- **Large Accelerated Filer**

An EGC will become a non-EGC on the date on which it becomes a large accelerated filer. The determination of whether a company is a large accelerated filer is made on the last day of the company's fiscal year pursuant to Rule 12b-2 of the Exchange Act. For a calendar year-end company, if it becomes a large accelerated filer on December 31, 2023, that would also be the first day that the issuer is a non-EGC. Therefore, compliance with non-EGC disclosure requirements will commence at the first periodic report thereafter, which would be the annual report Form 10-K for the year ending December 31, 2023.

⁶ See FRM 10110.4(b).

⁷ See Question 40 of the JOBS Act FAQs at [Jumpstart Our Business Startups Act, Frequently Asked Questions - Generally Applicable Questions on Title I of the JOBS Act \(sec.gov\)](#).

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