

FAST Act Offers More Goodies to Emerging Growth Companies

Xconomy, Boston (March 2, 2016) –

Once again proving that you can't judge a gift by its box, emerging growth companies (EGCs) received a pleasant, but oddly wrapped, surprise in December with the enactment of a new law authorizing spending on highway and transit projects. Although adopted with less fanfare than the JOBS Act, the new FAST Act (that's short for Fixing America's Surface Transportation Act) amended the JOBS Act to further streamline the IPO process for EGCs.



Are You an EGC?

David Westenberg

The JOBS Act was enacted in 2012 to make it easier for startup companies that qualify as EGCs to go public. An EGC is any company that had annual revenues of less than \$1 billion during its most recently completed fiscal year. If you're thinking of an IPO, odds are you qualify as an EGC. Last year, 93% of all IPOs in the U.S. were by EGCs. Click [here for additional detail](#) on the JOBS Act.

Public Filing Prior to Road Show

Under the JOBS Act, an EGC was required to publicly file its IPO registration statement no later than 21 days before commencing the road show. The FAST Act reduced this time period to 15 days. This should allow an EGC to get to market faster when the IPO "window" is open—potentially very valuable given the volatility of the IPO market.

EGC Grace Period

Confidential review of an IPO registration statement is one of the most important benefits available to an EGC, since it allows the company to maintain its IPO plans in secrecy and delay disclosure of sensitive information to competitors, employees, and others.

Under the JOBS Act, a company must qualify as an EGC in order to elect confidential review of a draft registration statement. Eligibility as an EGC is then re-determined at the time of the initial public filing of the registration statement.

The FAST Act adds a grace period for a company that loses its EGC status prior to completion of the IPO. In this limited circumstance, the company will continue to be treated as an EGC through the earlier of:

- the date on which the company completes its IPO; or
- one year after the company ceases to be an EGC.

Absent this change, if a company ceased being an EGC while undergoing confidential review, it would be required to publicly file a registration statement that complied with the more onerous disclosure rules and regulations applicable to companies that are not EGCs in order to continue the IPO process.

Omission of Certain Financial Statements

SEC rules require an IPO company to include current financial statements in its registration statement and to update those financial statements by the time of the offering. However, the FAST Act permits an EGC to omit from its registration statement financial information for historical periods if:

- the company reasonably believes that the omitted financial information will not be required to be included in the registration statement at the time of the offering; and
- before distributing a preliminary prospectus to investors, the company amends the registration statement to include all required financial information at the date of such amendment.

This enables an EGC to avoid devoting time and resources to preparing financial statements solely to comply with technical requirements at the time it starts the IPO process but that would not otherwise be required at the actual time of the offering.

There's one important caveat: a company may not omit interim financial statements for a period that is part of a longer period for which financial statements will be required at the time of the offering. For example, a company may not omit financial statements for the first half of 2016 if it will be required to provide financial statements for the first nine months of 2016 at the time of the offering.

Other Provisions

The FAST Act also amended several other securities law provisions that are not focused on the IPO process. Click [here for additional detail](#) regarding the FAST Act.

The Bottom Line

True to its mission, the JOBS Act has already smoothed the way to an IPO for many startup companies. The FAST Act should make the IPO journey a bit easier.

—By David Westenberg, [WilmerHale](#)

David Westenberg is a partner in the Corporate and Capital Markets Practice Groups in WilmerHale's Boston office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.