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**Smaller Reporting  
Companies vs. Emerging  
Growth Companies**

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## Smaller Reporting Companies vs. Emerging Growth Companies

The topic of reporting requirements and distinctions between various categories of reporting companies has been prevalent over the past couple of years as regulators and industry insiders examine changes to the reporting requirements for all companies, and qualifications for the various categories of [scaled disclosure requirements](#). As I've written about these developments, I have noticed inconsistencies in the treatment of smaller reporting companies and emerging growth companies in ways that are likely the result of poor drafting or unintended consequences. This blog summarizes two of these inconsistencies.

As a reminder, a [smaller reporting company](#) is currently defined as a company that has a public float of less than \$75 million in common equity as of the last business day of its most recently completed second fiscal quarter, or if a public float of zero, has less than \$50 million in annual revenues as of its most recently completed fiscal year-end. I note that on June 27, 2016, the SEC issued a proposed rule to change that definition. The SEC proposes to amend the definition of a smaller reporting company to include companies with less than a \$250 million public float as compared to the \$75 million threshold in the current definition. In addition, if a company does not have an ascertainable public float, a smaller reporting company would be one with less than \$100 million in annual revenues, as compared to the current threshold of less than \$50 million. Once considered a smaller reporting company, a company would maintain that status unless its float drops below \$200 million or its annual revenues drop below \$80 million.

An [emerging growth company](#) ("EGC") is defined as a company with total annual gross revenues of less than \$1 billion during its most recently completed fiscal year that first sells equity in a registered offering after December 8, 2011. An EGC loses its EGC status on the earlier of (i) the last day of the fiscal year in which it exceeds \$1 billion in revenues; (ii) the last day of the fiscal year following the fifth year after its IPO (for example, if the issuer has a December 31 fiscal year-end and sells equity securities pursuant to an effective registration statement on May 2, 2016, it will cease to be an EGC on December 31, 2021); (iii) the date on which it has issued more than \$1 billion in non-convertible debt during the prior three-year period; or (iv) the date it becomes a large accelerated filer (i.e., its non-affiliated public float is valued at \$700 million or more). EGC status is not available to asset-backed securities issuers ("ABS") reporting under Regulation AB or investment companies registered under the Investment Company Act of 1940, as amended. However, business development companies (BDC's) do qualify.

### The Fast Act

The FAST Act, passed into law on December 4, 2015, amended Form S-1 to allow for forward incorporation by reference by [smaller reporting companies](#). A smaller reporting company may now incorporate any documents filed by the company, following the effective date of a registration statement, into such effective registration statement. In what was probably unintended in the drafting, the [FAST Act](#) changes only include smaller reporting companies and not emerging growth companies. Generally, forward incorporation by reference requires that the company be S-3 eligible. The FAST Act change has created an anomaly whereby a smaller reporting company can utilize forward incorporation by reference but an EGC could not unless it was also S-3 eligible.

### Testing the Waters in an IPO

[Test-the-waters communications](#) involve solicitations of indications of interest for an offering prior to the effectiveness of a registration statement. Where Regulation A freely allows, and even encourages, test-the-waters communications, the standard IPO process using a Form S-1 still strictly limits pre-effectiveness solicitations of interest and offering



communications overall. Section 5(a) of the Securities Act prohibits the sale of securities before the registration statement is deemed effective. Communications made by the company during an IPO process, depending on the mode and content, result in violations of Section 5 of the Securities Act of 1933 (the “Securities Act”). Communication-related violations of Section 5 during the pre-filing and pre-effectiveness periods are often referred to as “[gun jumping](#).”

In April 2012, the Jumpstart Our Business Startups Act (the “JOBS Act”) was enacted, which, in part, established a new process and disclosures for public offerings by EGC’s.

Section 105(c) of the JOBS Act provides an EGC with the flexibility to “test the waters” by engaging in oral or written communications with qualified institutional buyers (“QIB’s”) and institutional accredited investors (“IAI’s”) in order to gauge their interest in a proposed offering, whether prior to (irrespective of the 30-day safe harbor) or following the first filing of any registration statement, subject to the requirement that no security may be sold unless accompanied or preceded by a Section 10(a) prospectus. Generally, in order to be considered a QIB, you must own and invest \$100 million of securities, and in order to be considered an IAI, you must have a minimum of \$5 million in assets. For a more complete discussion on the test-the-waters provisions available to EGC’s, see my blog [HERE](#).

Section 105(c) is not available for smaller reporting companies. Where a smaller reporting company is not also an EGC, it cannot engage in Section 105(c) test-the-waters communications made available under the JOBS Act. This is clearly a legislative miss. The JOBS Act is intended to create capital-raising opportunities for small companies. Although I understand that the thought was to assist EGC’s in the IPO process, the fact is that many smaller reporting companies engage in a series of follow-on public offerings before reaching a size and level of maturity where they no longer need the assistance of rules and laws designed to encourage capital in smaller companies. Ironically, by that point, these companies will be able to engage in additional communications only available to eligible larger issues, such as free writing prospectus and Rule 163 communications.

Refresher on [Regulation S-K](#) and [S-X](#) Differences for Smaller Reporting Companies and EGC’s

The [scaled-down disclosures](#) for smaller reporting companies and emerging growth companies include, among other items: (i) only 3 years of business description as opposed to 5; (ii) 2 years of financial statements as opposed to 3; (iii) elimination of certain line item disclosures such as certain graphs and selected financial data; and (iv) relief from the 404(b) auditor attestation requirements. However, although similar, there are differences between the scaled disclosure requirements for an emerging growth company vs. a smaller reporting company. In particular, the following chart summarizes these differences:

Scaled Disclosure Requirement	Emerging Growth Company	Smaller Reporting Company
Audited Financial Statements Required	2 years in a Securities Act registration statement for an IPO of common equity.  3 years in an IPO of debt securities.	2 years.



	3 years in an annual report or Exchange Act registration statement, unless the company is also an SRC.	
Description of Business (Item 101)	Standard disclosure requirements apply.	Development of its business during the most recent three years, including:  form and year of organization;  bankruptcy proceedings;  material reclassification, merger, sale or purchase of assets; and  description of the business.  Not required:  seasonality;  working capital practices;  backlog; or  government contracts.  Names of principal suppliers.  Royalty agreements or labor contracts.  Need for government approval of principal products and services.  Effect of existing or probable governmental regulations.
Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters (Item 201)	Standard disclosure requirements apply.	Not required to provide the stock performance graph.
Selected Financial Data (Item	Not required to present selected financial data for any period	Not required.



301)	prior to the earliest audited period presented in initial registration statement.	
Supplementary Financial Data (Item 302)	Not required until after IPO.	Not required.
MD&A (Item 303)	May limit discussion to those years for which audited financial statements are included.	May limit discussion to those years for which audited financial statements are included.  Not required to comply with contractual obligations table requirements in 303(a)(5).
Quantitative and Qualitative Disclosures about Market Risk (Item 305)	Standard disclosure requirements apply.	Not required, but related disclosure may be required in MD&A.
Extended Transition for Complying with New or Revised Accounting Standards	May elect to defer compliance with new or revised financial accounting standards until a company that is not an "issuer" <sup>894</sup> is required to comply with such standards.  Any decision to forgo the extended transition period is irrevocable.	Standard disclosure requirements apply.
Internal Control over Financial Reporting (Item 308)	Not required to provide attestation report of the registered public accounting firm.  Not exempt from Item 308(a), but newly public company is not required to comply until it either has filed or has been required to file an annual report for the prior fiscal year.	Non-accelerated filers, a category that includes SRC's, are not required to provide an attestation report of the registered public accounting firm.



**Executive Compensation Disclosure (Item 402)**

Permitted to follow requirements for SRC's.

2 years of summary compensation table information, rather than 3.

Exempt from principal executive officer pay ratio disclosure.

Limited to principal executive officer, two most highly compensated executive officers and up to two additional individuals no longer serving as executive officers at year-end.<sup>896</sup>

Not required:

compensation discussion and analysis;

grants of plan-based awards table;

option exercises and stock vested table;

change in present value of pension benefits;

CEO pay ratio;

compensation policies as related to risk management; or

pension benefits table.

Description of retirement benefit plans.

**Scaled Disclosure Requirement**

**Emerging Growth Company**

**Smaller Reporting Company**

Certain Relationships and Related Party Transactions (Item 404)

Standard disclosure requirements apply.

Lower threshold to disclose related party transactions.

Not required to disclose procedures for review, approval or ratification of related party transactions.

Additional requirement to disclose certain controlling entities.

Required to disclose related party transactions not only since the beginning of last fiscal year but also for the preceding fiscal year.



Corporate Governance (Item 407)	Standard disclosure requirements apply.	Not required to disclose whether it has an audit committee financial expert until its second annual report following IPO.  Exempt from requirements to disclose compensation committee interlocks and insider participation and to provide a compensation committee report.
Risk Factors (Item 503(c))	Standard disclosure requirements apply.	Not required in periodic reports.
Ratio of Earnings to Fixed Charges (Item 503(d))	Required for the same number of years for which it provides selected financial data disclosures.	Not required.

### The Author

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[Securities attorney](#) Laura Anthony and her experienced legal team provides ongoing corporate counsel to small and midsize private companies, OTC and exchange traded issuers as well as private companies going public on the NASDAQ, NYSE MKT or over-the-counter market, such as the OTCQB and OTCQX. For nearly two decades [Legal & Compliance, LLC](#) has served clients providing fast, personalized, cutting-edge legal service. The firm's reputation and relationships provide invaluable resources to clients including introductions to investment bankers, broker-dealers, institutional investors and other strategic alliances.

The firm's focus includes, but is not limited to, compliance with the Securities Act of 1933 offer sale and registration requirements, including private placement transactions under Regulation D and Regulation S and PIPE Transactions as well as registration statements on Forms S-1, S-8 and S-4; compliance with the reporting requirements of the Securities Exchange Act of 1934, including registration on Form 10, reporting on Forms 10-Q, 10-K and 8-K, and 14C Information and 14A Proxy Statements; Regulation A/A+ offerings; all forms of going public transactions; mergers and acquisitions including both reverse mergers and forward mergers; applications to and compliance with the corporate governance requirements of securities exchanges including NASDAQ and NYSE MKT; crowdfunding; corporate; and general contract and business transactions.

Attorney Laura Anthony and her firm represents both target and acquiring companies in reverse mergers and forward mergers, including the preparation of transaction documents such as merger agreements, share exchange agreements, stock purchase agreements, asset purchase agreements and reorganization agreements. Ms. Anthony's legal team prepares the necessary documentation and assists in completing the requirements of federal and state securities laws



and SROs such as FINRA and DTC for 15c2-11 applications, corporate name changes, reverse and forward splits and changes of domicile.

Securities attorney Laura Anthony is an approved PAL Advisor with OTC Markets Group, the creator and author of [SecuritiesLawBlog.com](http://SecuritiesLawBlog.com), the OTC Market's top source for industry news, and the producer and host of [LawCast.com](http://LawCast.com), The Securities Law Network, and a contributing blogger for [The Huffington Post](http://The Huffington Post).

Domestically, the firm currently represents clients in [New York](http://New York), Las Vegas, Los Angeles, Miami, Boca Raton, West Palm Beach, Atlanta, Phoenix, Scottsdale, Charlotte, Cincinnati, Cleveland, Washington, D.C., [Denver](http://Denver), Tampa, Detroit and Dallas, as well as other major metropolitan areas,. Internationally, the firm represents clients in China, Canada, Malaysia and Singapore and other points abroad.

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