May 9, 2016

SEC Increases Thresholds for Exchange Act Registration

On May 3, 2016, the SEC adopted final rules, substantially as proposed in December 2014, under the Jumpstart Our Business Startups Act (the "JOBS Act") and the Fixing America's Surface Transportation Act (the "FAST Act") that reflect new, higher thresholds for registration under the Securities Exchange Act of 1934 (the "Exchange Act"). The SEC also adopted rules that implement higher thresholds for termination of registration and suspension of reporting for banks and bank holding companies and savings and loan holding companies. In addition, the SEC revised the definition of "held of record" in Exchange Act Rule 12g5-1 to exclude certain securities held by persons who received them pursuant to employee compensation plans in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act of 1933 (the "Securities Act") and to establish a non-exclusive safe harbor for determining whether securities are "held of record" for purposes of registration under Exchange Act Section 12(g).

Background

The JOBS Act amended Sections 12(g) and 15(d) of the Exchange Act to adjust the thresholds for registration, termination of registration and suspension of reporting under the Exchange Act. Specifically, the JOBS Act amended Section 12(g)(1) of the Exchange Act to require an issuer to register a class of equity securities (other than exempted securities) within 120 days after its fiscal year end if, on the last day of its fiscal year, the issuer has total assets of more than $10 million and a class of equity securities "held of record" by either (i) 2,000 persons or (ii) 500 persons who are not accredited investors. The prior threshold had been 500 holders of record without regard to accredited investor status.

The JOBS Act established a separate registration threshold for banks and bank holding companies pursuant to which an issuer must register a class of equity securities (other than exempted securities) within 120 days after the last day of its fiscal year end if, on the last day of its fiscal year, the issuer has total assets of more than $10 million and a class of equity securities is "held of record" by 2,000 or more persons, without regard to accredited investor status.

The JOBS Act also amended the Exchange Act to enable an issuer that is a bank or a bank holding company to terminate the registration of a class of securities under Section 12(g) or suspend reporting under Section 15(d)(1) if that class is held of record by fewer than 1,200 persons. For other issuers, the threshold for termination of registration and suspension of reporting remains at 300 persons. The JOBS Act further amended the Exchange Act to exclude from the definition of "held of record," for purposes of determining whether an issuer is required to register a class of equity securities, securities that are held by

persons who received them pursuant to an "employee compensation plan" in transactions exempt from the registration requirements of Section 5 of the Securities Act.

Subsequently, the FAST Act adjusted the Exchange Act thresholds for registration, termination of registration and suspension of reporting for savings and loan holding companies, as defined in Section 10 of the Home Owners' Loan Act, so that they would be the same as the thresholds for banks and bank holding companies.

The Final Rules

Increased Thresholds for Registration and Reporting Requirements

The SEC has amended to Rule 12g-1 under the Exchange Act to exempt an issuer from the requirement to register a class of equity securities and comply with reporting obligations under the Exchange Act if the class of equity securities was held of record by fewer than 2,000 persons or 500 persons who are not accredited investors. The SEC did not establish a new definition of "accredited investor" for purposes of the new rule and will rely on the existing definition of "accredited investor" set forth in Securities Act Rule 501(a). The "accredited investor" determination will be made as of the last day of the issuer's most recent fiscal year rather than at the time of the sale of the securities.

Although some commenters requested that the SEC provide guidance on making the "accredited investor" determination in the Section 12(g) context or establish a safe harbor relating to that determination (for instance, by permitting issuers to rely on information obtained at the time securities were initially or most recently sold to that person, by means of an annual self-certification or affirmation, or determinations made by certain third parties), the SEC declined to do so, noting that a safe harbor could become a *de facto* minimum standard. Issuers will be required to consider their particular facts and circumstances in establishing a reasonable basis for their "accredited investor" determination.

The final rules establish a separate threshold for banks and bank holding companies and savings and loan holding companies that would exempt an issuer from the registration and reporting requirements of the Exchange Act if the class of equity securities was held by fewer than 2,000 persons, without regard to accredited investor status. With the exception of the clarification as to timing of the determination of accredited investor status, these changes are consistent with the JOBS Act modifications.

Amendments to Termination and Suspension Requirements for Banks and Bank Holding Companies and Savings and Loan Holding Companies

The SEC has amended the thresholds contained in Rules 12g-2 and 12g-3 under the Exchange Act for terminating registration and suspending reporting requirements applicable to banks and bank holding companies and savings and loan holding companies from 300 persons to 1,200 persons. Rules 12g-4 and

12h-3 currently permit issuers, once reaching the designated threshold, to immediately suspend their duty to file periodic and currently reports under the Exchange Act. The rule changes will allow banks and bank holding companies and savings and loan holding companies to rely on the SEC's rules to suspend reporting immediately, to avoid being deemed registered upon the termination of certain exemptions or as a successor issuer, and to terminate their registration during the fiscal year, at the higher 1,200-holder threshold. This higher threshold was established in order to accommodate concerns of smaller community banks.

Exclusion from Definition of "Held of Record" of Securities Received Pursuant to Employee Compensation Plan

The JOBS Act provides that the definition of "held of record" shall not include securities held by persons who received the securities pursuant to an "employee compensation plan" in transactions exempt from the registration requirements of Section 5 of the Securities Act. The term "employee compensation plan" is not defined.

Rather than creating a new definition for the term "employee compensation plan," the SEC is revising the definition of "held of record" and establishing a non-exclusive safe harbor that relies on the current definition of "compensatory benefit plan" in Rule 701 of the Securities Act and the conditions in Rule 701(c). The SEC believes that by not defining the term "employee compensation plan," and by providing for a non-exclusive safe harbor, it is providing issuers with flexibility in their determinations under Section 12(g)(5).

Held of Record. The SEC is amending the definition of "held of record" to provide that when determining whether an issuer is required to register a class of equity securities with the SEC pursuant to Exchange Act Section 12(g)(1) an issuer may exclude securities that are either:

- Held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act; or

- Held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for excludable securities under Exchange Act Rule 12g5-1(a)(8)(i)(A), as long as the persons were eligible to receive securities pursuant to Rule 701(c) at the time the excludable securities were originally issued to them. This exclusion is intended to facilitate the ability of issuers to conduct restructurings, business combinations and similar transactions that are exempt from Securities Act registration so that if the securities being surrendered would not have counted as "held of record" the securities issued in exchange also would not count. In a change from the proposed rules, securities held by former

employees could be excluded if they were received in an exempt transaction in substitution or exchange for excludable securities and the former employees were eligible under Rule 701(c) to receive the original securities at the time of issuance.

Family members (as defined in Rule 701(c)) who receive the equity securities as a result of the employee's (or former employee's) gift, domestic relations order, or death are also considered as persons who received "the securities pursuant to an employee compensation plan" for purposes of the rule.

*Non-exclusive Safe Harbor for Determining Holders of Record***.** The final rules establish a safe harbor for determining holders of record. The safe harbor provides that an issuer may deem a person to have received securities pursuant to an employee compensation plan if the plan, and the person who received the securities pursuant to the plan, meet the plan and participant conditions of Securities Act Rule 701(c).

An issuer will be able to rely on the safe harbor for determining the holders of securities issued in reliance on Rule 701, as well as holders of securities issued in transactions otherwise exempted from, or not subject to, the registration requirements of the Securities Act that satisfy the conditions of Rule 701(c), even if all the other conditions of Rule 701, such as issuer eligibility in Rule 701(b)(1), the volume limitations in Rule 701(d) or the disclosure delivery provisions in Rule 701(e), are not met. As a result, the safe harbor will be available for holders of securities received in other employee compensation plan transactions exempted from, or not subject to, the registration requirements of Section 5 of the Securities Act, such as securities issued in reliance on Securities Act Section 4(a)(2), Regulation A, Regulation D, or Regulation S under the Securities Act, that also meet the conditions of Rule 701(c).

In response to comments to the proposed rules, the SEC added a provision that permits an issuer, solely for the purposes of Section 12(g), to deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

In addition, foreign private issuers will be able to rely on the safe harbor when making their determination of the number of U.S. resident holders under Exchange Act Rule 12g3-2(a). Under Rule 12g3-2(a), foreign private issuers that meet the asset and shareholder thresholds of Section 12(g) are exempt from registering any class of securities under that section if the class of securities is held by fewer than 300 holders resident in the United States. For purposes of determining whether this threshold is met, Rule 12g3-2(a)(1) specifies that the method shall be as provided in Exchange Act Rule 12g5-1, subject to specific provisions relating to brokers, dealers, banks and nominees. Because the rule directs issuers to the definition of "held of record" in Rule 12g5-1, the statutory changes to Section 12(g)(5) as well as the changes to Rule 12g5-1 also apply to the determination of a foreign private issuer's U.S. resident holders for the purposes of the Rule 12g3-2(a) analysis. Note that securities held by employees will continue to be counted for purposes of determining the percentage of the issuer's outstanding securities held by U.S. residents and foreign private issuer status.

The final rules will become effective 30 days following their publication in the federal register. For a copy of the final rules, see: http://www.sec.gov/rules/final/2016/33-10075.pdf .

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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