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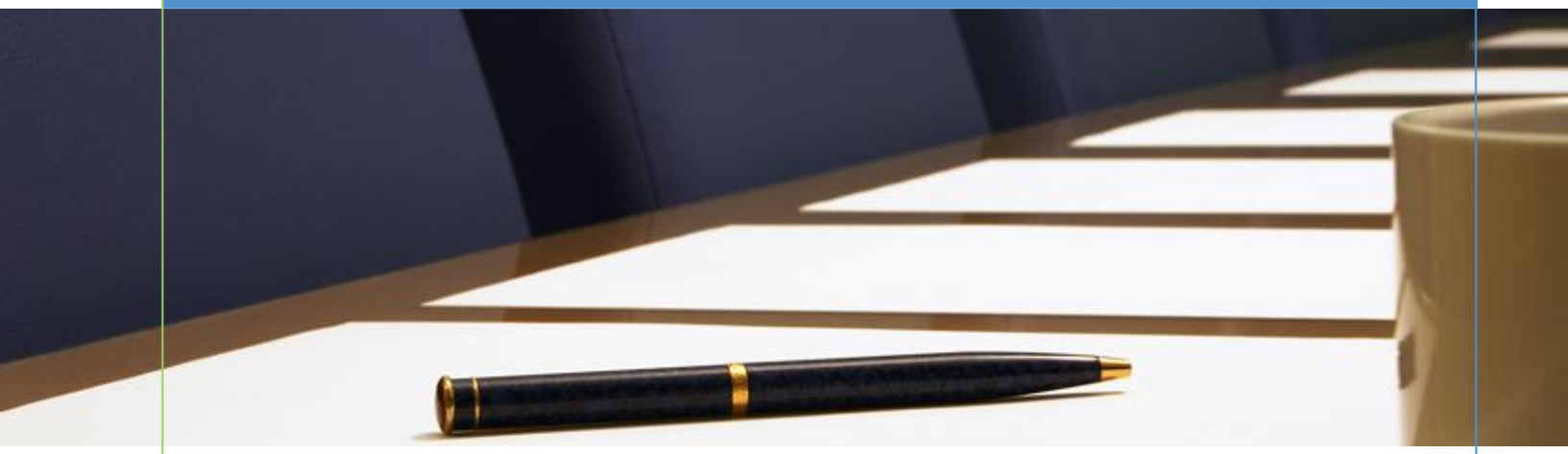
ALERT

Global Securities | January 2015



SEC Proposes Amendments to Registration Requirements Further Implementing the JOBS Act

On Dec. 18, 2014, the Securities and Exchange Commission (SEC) proposed amendments to current rules under Section 12(g) of the Securities Exchange Act of 1934, as amended (Exchange Act), that would implement provisions of Titles V and VI of the Jumpstart Our Business Startups Act, which became law in 2012 (the JOBS Act).[1] The proposals reflect higher thresholds for Exchange Act registration, termination of registration and suspension of reporting.[2] In addition, the proposals would apply to savings and loan holding companies similar treatment as banks and bank holding companies with respect to increased registration and termination thresholds. The proposed amendments would also revise the Exchange Act definition of the term "held of record" to exclude certain securities held by persons who received them pursuant to employee compensation plans and would establish a safe harbor for determining whether securities are "held of record" for purposes of Section 12(g) registration. Finally, the proposal solicits the views of commentators on various questions posed by the SEC in the Release.

I. Proposed Amendments Increasing Exchange Act Reporting and Termination Thresholds

Exchange Act Registration Thresholds

The JOBS Act revised Section 12(g) of the Exchange Act to require an issuer to register a class of equity 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 that is "held of record" by either (a) 2,000

[1] Release No. 33-9693 (the Release)

[2] The SEC noted in the Release that the changes to the Sections 12(g)(1), 12(g)(4) and 15(d)(1) of the Exchange Act were effective upon enactment of the JOBS Act and do not require SEC action. The proposed rules largely are intended to implement those statutory changes in the SEC's rules and to make such rules consistent with the statutory changes.

persons or (b) 500 persons who are not accredited investors. This threshold is a significant increase from the prior law (which mandated registration based on assets of $1 million and a class of equity securities with 500 or more holders of record) that now permits early stage companies to defer Exchange Act registration and reporting.

Since current Exchange Act Rule 12g-1 does not reflect the holder of record standards of the JOBS Act, the SEC is proposing to revise Exchange Act Rule 12g-1 to reflect that issuers are exempt from Exchange Act registration if they either have total assets not exceeding $10 million or fail to meet the higher record holder thresholds mandated by the JOBS Act.

Exchange Act "Accredited Investor" Determination

To rely on the proposed higher registration threshold in the JOBS Act, non-reporting companies will now need to monitor the accredited investor status of their record holders. Proposed Rule 12g-1 would apply the definition of "accredited investor" in Rule 501(a) under the Securities Act of 1933, as amended (Securities Act), to determinations under Exchange Act Section 12(g)(1). Unlike Rule 501, however, which is normally applied to exempt securities offerings under the Securities Act, "accredited investor" status for purposes of proposed Rule 12g-1 would be determined at the end of the issuer's fiscal year.

The SEC notes in the Release that the increased registration threshold established by the JOBS Act is intended to permit issuers to defer Exchange Act registration until issuers have a larger shareholder base.

Banks and Bank Holding Companies

The JOBS Act amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or a bank holding company to register a class of equity securities within 120 days after the last day of its fiscal year 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 that is "held of record" by 2,000 or more persons.

In addition, the JOBS Act amended Sections 12(g)(4) and 15(d)(1) of 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) of the Exchange Act if that class is held of record by less than 1,200 persons. The JOBS Act, however, excluded savings and loan holding companies from the definition of bank or bank holding companies thus denying them the benefits of the JOBS Act's higher registration and termination thresholds.

Proposed Exchange Act Rule 12g-1 would make the higher registration and termination thresholds that are applicable to banks and bank holding companies under the JOBS Act also applicable to savings and loan holding companies, thus equalizing the treatment of all depository institutions. The SEC estimated that approximately 90 out of 125 currently registered and reporting savings and loan holding companies may be eligible to terminate Exchange Act registration under the proposed threshold.

Further, the SEC also proposes to revise Exchange Act Rules 12g-2, 12g-3, 12g-4 and 12h-3 to allow saving and loan holding companies to suspend current and periodic reporting at the 1,200 holder threshold in the same manner as banks and bank holding companies. The proposed rules will allow banks and bank holding companies (including savings and loan holding companies) to immediately suspend their Section 13(a) reporting obligations during the fiscal year, at the higher threshold, upon the filing of a Form 15 rather than waiting 90 days under the current regulatory scheme.

II. Proposed Amendment to the Exchange Act Definition of "Held of Record"

Related to the Exchange Act registration thresholds, the JOBS Act also amended Exchange Act Section 12(g)(5), to exclude from the definition of "held of record" securities that are held by persons who received them pursuant to an "employee compensation plan" in transactions exempted from the registration requirements of Section 5 of the Securities Act.

The JOBS Act expressly instructed the SEC to revise the definition of "held of record" in its rules to create a non-exclusive safe harbor for issuers when determining whether holders received their securities pursuant to an "employee compensation plan" in an exempt transaction. Under proposed Rule 12g5-1, an issuer may, when determining whether the "held of record" threshold is met, exclude securities:

(A) received pursuant to an employee compensation plan in transactions:

(1) exempt from the registration requirements of the Securities Act; or

(2) that did not involve a sale under Section 2(a)(3) of the Securities Act; and

(B) held by persons eligible to receive securities from the issuer pursuant to Securities Act Rule 701(c) who acquired the securities in exchange for securities excludable under the proposed definition of "held of record."

Clause (B) of the proposed rule would facilitate the ability of an issuer to conduct restructurings, business combinations and similar transactions that are exempt from Securities Act registration.

The proposed Rule 12g5-1 safe harbor would be available for Rule 701(c) plan participants. including employees, directors, general partners, trustees, officers and certain consultants and advisors, as well as permitted family member transferees with respect to securities acquired by gift or domestic relations order, or in connection with options (and securities subsequently acquired through exercise) transferred to them by the plan participant through gifts or domestic relations orders.

III. Requests for Additional Comments

Given that the proposed rules are intended to make existing Exchange Act rules consistent with the relaxed registration and reporting requirements mandated by the JOBS Act, these technical changes should not be controversial. Nevertheless, the SEC invites concerned parties to submit comments on the proposed rules on or prior to March 2, 1015. The SEC also requests comments on a number of related issues, such as whether a foreign issuer may rely on certain provisions of the rules, investor access to information about issuers, possible safe harbors regarding identification of accredited investors, and the timeliness of the information that may be relied upon to identify accredited investors, among other issues. It is anticipated that the proposal will be adopted by the SEC substantially in its current form.

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