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U.S. Securities Law Briefing.
SEC Raises Exchange Act Registration, Termination and Suspension Thresholds to Conform with JOBS Act and FAST Act

Yesterday, the U.S. Securities and Exchange Commission (the "SEC") adopted final amendments conforming its rules with adjustments mandated by Congress to the thresholds for registration, termination of registration and suspension of reporting in Sections 12(g) and 15(d) of the U.S. Securities Exchange Act of 1934 (the "Exchange Act").

The SEC's amendments do not extend substantially beyond reflecting the statutory changes to the Exchange Act made by the Jumpstart Our Business Startups Act (the "JOBS Act") and the Fixing America's Surface Transportation Act (the "FAST Act"). The amendments – which become effective 30 days after publication in the Federal Register – will make it easier for banks and bank holding companies, as well as savings and loan holding companies, to suspend or terminate their Exchange Act reporting obligations.

JOBS and FAST Act amendments

Prior to the JOBS Act, Section 12(g) of the Exchange Act required an issuer to register a class of its equity securities if, at the end of the issuer's fiscal year, the securities were "held of record" by 500 or more persons and the issuer had total assets exceeding US$1m (raised to US$10m by SEC rule in 1996). Section 15(d) of the Exchange Act requires an issuer that has had an effective registration statement under the U.S. Securities Act of 1933 (the "Securities Act") to file the same reports as an issuer with a registered class of securities under Section 12 of the Exchange Act.

Under pre-JOBS Act Section 12(g) and SEC rules, an issuer that had a class of equity securities registered under Section 12(g) could terminate that registration if the number of record holders of that class fell below 300, or the number of record holders of that class fell below 500 and the issuer's assets were no more than US$10m at the end of each of its last three fiscal years. Also prior to the JOBS Act, an issuer's reporting obligation was automatically suspended under Section 15(d) if, on the first day of any fiscal year other than the year in which the registration statement became effective, there were fewer than 300 holders of record of the class of securities offered under the registration statement.

The JOBS Act amended Section 12(g)(1) to require an issuer to register a class of equity securities (other than exempted securities) within 120 days

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after its fiscal year end if, on the last day of its fiscal year, the issuer has total assets of more than US$10m and the class of equity securities is held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. For a bank or a bank holding company (together, "banks"), as defined in Section 2 of the U.S. Bank Holding Company Act of 1956, the "held of record" threshold is 2,000 or more persons irrespective of accredited investor status.

The JOBS Act also amended Section 12(g)(5) of the Exchange Act 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 SEC was directed to revise the definition of "held of record" to implement the JOBS Act amendments and to create a safe harbor for issuers when determining whether holders received their securities pursuant to an employee compensation plan.

The JOBS Act also revised Sections 12(g)(4) and 15(d)(1) of the Exchange Act to enable an issuer that is a bank 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 non-bank issuers, the threshold in Section 12(g)(4) for termination of registration and in Section 15(d) for suspension of reporting was not changed and remains 300 persons.

In 2015, the FAST Act adjusted the Exchange Act thresholds for registration, termination of registration and suspension of reporting for savings and loan holding companies, so that they would be the same as the thresholds for banks and bank holding companies.

Overview of new changes

The SEC's final amendments do not differ significantly from the amendments as proposed in 2014. They are primarily intended to reflect the JOBS Act's and FAST Act's statutory changes to the SEC rules governing registration under Section 12(g), termination of registration under Section 12(g) and suspension of reporting obligations under Section 15(d). The amendments also apply the definition of "accredited investor" in Securities Act Rule 501(a) to Rule 12(g)(1); amend the definition of "held of record" to exclude securities received under employee compensation plans; and create a non-exclusive safe harbor for determining when securities have been received under employee compensation plans.

Registration, termination and suspension thresholds

To conform its Exchange Act rules with both Acts, the SEC is making the following changes:

> *Rule 12g-1* — This rule currently provides an exemption from Section 12(g)(1) registration for an issuer that on the last day of its most recent fiscal year had total assets not exceeding US$10m and, with respect to a foreign private issuer, such securities were not quoted in a U.S.

automated inter-dealer quotation system. The amendments add an exemption for a class of equity securities held of record by fewer than 2,000 persons or 500 persons who are not accredited investors; and, for banks and savings and loan holding companies, a class of equity securities held of record by fewer than 2,000 persons. The extra condition for foreign private issuers has been deleted, as it is outdated.[1]

> *Rule 12g-2* — This rule deals with registered securities for which the listing and registration (and therefore their Section 12(g)(2) exemption) are terminated and establishes a 300-person threshold for such a class of securities to be required to be registered under Section 12(g). The amendments add the 1,200 person threshold for banks and savings and loan holding companies.

> *Rule 12g-3* — This rule addresses the 300-person threshold for the registration requirement of securities of successor issuers under Section 12(b) or Section 12(g). The amendments add the 1,200-person threshold for banks and savings and loan holding companies.

> *Rule 12g-4* — This rule provides that termination of Section 12(g) registration takes effect in 90 days, or such shorter period as the SEC determines, after the issuer certifies on Form 15 that the class of securities is held by less than 300 persons, or 500 persons where the total assets of the issuer have not exceeded US$10m on the last day of each of the preceding three years. It also provides that the duty to file current and periodic reports under Exchange Act Section 13(a) for that class of securities is suspended immediately upon the filing of Form 15. The amendments add the 1,200-person threshold for banks and savings and loan holding companies.

> *Rule 12h-3* — This rule provides that the duty to file current and periodic reports under Section 13(a) pursuant to Section 15(d) for that class of securities is suspended immediately upon the filing of a certification on Form 15, provided that, among other conditions, the issuer has less than 300 holders of record. The amendments add the 1,200-person threshold for banks and savings and loan holding companies.

Although the 1,200 holder-of-record threshold had already been incorporated into the Exchange Act through direct amendment by the JOBS Act and FAST Act, the SEC's amendments mean that banks and savings and loan holding companies will soon be able to rely on the new threshold to terminate registration and suspend reporting when using the procedural accommodations available in the above SEC rules.

[1] When the rule was adopted, the NASDAQ Stock Market was the only automated inter-dealer quotation system in existence and it has subsequently registered as a securities exchange with the SEC. Consequently, the reference is no longer necessary.

Definition of accredited investor

As amended by the JOBS Act, Section 12(g)(1) requires registration by an issuer (other than a bank) if it has total assets exceeding US$10m and a class of equity security held of record by either 2,000 persons or 500 persons who are not accredited investors. The amendments apply the definition of "accredited investor"[2] in Rule 501(a) of Regulation D under the Securities Act in making determinations pursuant to Section 12(g)(1), and direct such determinations to be made as of the last day of the fiscal year (rather than at the time of the sale of the securities, as it is under Regulation D).

The SEC opted not to issue a safe harbor or other guidance regarding how to establish a reasonable belief that a security holder is an accredited investor for the purposes of Section 12(g)(1).

Excluding securities received under employee compensation plans

Section 12(g)(5) of the Exchange Act, as amended by the JOBS Act, provides that the definition of "held of record" shall not include securities 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.[3] The provision does not, however, define the term "employee compensation plan," and the SEC has chosen not to define it in its rules.

The amendments revise the definition of "held of record" and establish a non-exclusive safe harbor that relies on the current definition of "compensatory benefit plan" in Rule 701 under the Securities Act.

Rule 12g5-1, which sets out how to determine whether securities are "held of record", will be amended to add a new provision — Rule 12g5-1(a)(8) — stating that for the purposes of determining whether an issuer is required to register a class of equity securities pursuant to Section 12(g)(1), an issuer may exclude securities:

(A) 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; or

(B) 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 this issuer, a predecessor of the issuer or an acquired company in substitution or exchange for excludable securities under (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.

Non-exclusive safe harbor

As directed by the JOBS Act, the SEC's amendments also include a non-exclusive safe harbor under which an issuer may deem a person to have

[2] The SEC is considering amendments to the definition of accredited investor in Regulation D in a separate action.

[3] The exclusion is meant to apply solely for purposes of determining whether an issuer is required to register a class of equity securities under the Exchange Act and not to a determination of whether such registration may be terminated or suspended.

received the securities pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of Securities Act Rule 701(c).[4]

Under the safe harbor, an issuer may, solely for the purposes of Section 12(g), 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.

Foreign private issuers

Rule 12g3-2(a)

Generally, non-reporting foreign private issuers rely on Rule 12g3-2(a) or (b), rather than any of the rules discussed above, as exemptions from the registration requirements of the Exchange Act.

Under Rule 12g3-2(a), a foreign private issuer is 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. Rule 12g3-2(a)(1) specifies that the "held of record" calculation method shall be as provided in Rule 12g5-1, subject to specific provisions relating to brokers, dealers, banks and nominees.

Consequently, the amendments to Section 12(g)(5) as well as the changes to Rule 12g5-1 will apply to the determination of a foreign private issuer's U.S. resident holders for the purposes of the Rule 12g3-2(a) analysis. This means a foreign private issuer will be permitted to exclude securities held by persons who received the securities pursuant to an employee compensation plan for the purposes of determining the percentage of its outstanding securities held by U.S. residents under Rule 12g3-2(a).

Foreign private issuer status

A foreign private issuer may not, however, take advantage of the exclusion for employee compensation plan securities for the purpose of determining its status as a foreign private issuer.

A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States.

The amendments revise the instructions to the definitions of foreign private issuer in Exchange Act Rule 3b-4 and Securities Act Rule 405 to make clear that securities held by employees must continue to be counted for the purpose of determining the percentage of the issuer's outstanding securities

[4] 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), would not need to be satisfied.

held by U.S. residents, and thus for determining whether an issuer qualifies as a foreign private issuer.

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We will continue to monitor developments in this area and welcome any queries you may have.

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