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SEC Approves Final Rules Implementing JOBS Act and FAST Act

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By: Garrett A. DeVries

Background

The JOBS Act was signed into law on April 5, 2012. Titles V and VI of the JOBS Act changed the 1934 Act in three significant ways:

1. Relaxed Registration Requirements. The JOBS Act relaxed the total asset and holder of record thresholds above which an issuer is required to register its securities under Section 12(g)(1) of the 1934 Act. Previously, an issuer was required to register its securities if the issuer had total assets exceeding $1 million and the securities were "held of record" by at least 500 persons. Section 501 of the JOBS Act raised the asset threshold from $1 million to $10 million and modified the ownership threshold so that registration would be required if the securities were "held of record" either by (i) 2,000 persons or (ii) 500 persons who are not "accredited investors" (as such term is defined by the Commission).

2. Special Rules for Banks and Bank Holding Companies. Section 601 of the JOBS Act provided additional exceptions for bank and bank holding companies, as defined in Section 2 of the Bank Holding Company Act of 1956. A bank or bank holding company is required to register its securities if it has $10 million in assets and at least 2,000 holders of record. The Commission had previously clarified that the 500 non-accredited investor threshold described above is not applicable to bank and bank holding companies. Additionally, a bank or bank holding company may terminate registration under Section 12(g)(4) of the 1934 Act if its number of holders of record is fewer than 1,200 persons. Other issuers may only de-register their securities under Section 12(g)(4) of the 1934 Act if their holders of record are fewer than 300 persons.

3. Exception for Securities Received in Employee Compensation Plans. Section 502 of the JOBS Act exempts persons who receive securities under an "employee compensation plan" in transactions exempt from registration under the Securities Act of 1933 (the "1933 Act") from being counted as a "holder of record" for purposes of the registration requirement under Section 12(g)(1) of the 1934 Act. Section 503 of the JOBS Act also specifically directs the Commission to "adopt safe harbor provisions" that issuers can follow in determining whether this exception applies to particular holders.

On December 4, 2015, the FAST Act was signed into law. Section 85001 of the FAST Act provides that the 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, under the 1934 Act would be the same as those applicable to bank and bank holding companies.

The Final Rules

The Commission proposed regulations on December 17, 2014, prior to the enactment of the FAST Act, and issued its final regulations on May 3, 2016. The final rules modified Rules 12g-1, (exemption from Section 12(g)), 12g-2 (securities deemed registered upon termination of exemption), 12g-3 (registration of securities of successor issuers), 12g-4 (termination of registration) and 12h-3 (suspension of duty to file reports under Section 15(d)) under the 1934 Act to conform with the new thresholds for registration, termination of registration and suspension of reporting set forth in the legislation described above, including those applicable to banks, bank holding companies and savings and loan companies.

Additionally, the final rules clarified that the definition of an "accredited investor" for purposes of determining whether a security is held of record by fewer than 500 people who are not accredited investors under Section 12(g)(1) is as defined in Rule 501(a) under Regulation D. The determination of a person's status as an accredited investor is to be made as of the last day of the issuer's most recent fiscal year. Under Rule 501(a), if the issuer "reasonably believes" that a person satisfies the definition of an accredited investor, such person will be deemed to be an accredited investor. Some commenters to the proposed rules had asked the Commission to adopt safe harbors that issuers could rely on in making this determination. Unfortunately, no such safe harbors appear in the final rules. The Commission release states that "an issuer will need to determine, based on facts and circumstances, whether prior information provides a basis for a reasonable belief that the security holder continues to be an accredited investor as of the last day of the fiscal year."

Finally, the rules implemented Sections 502 and 503 of the JOBS Act, exempting persons who received securities in an employee compensation plan from counting towards the number of "holders of record" of the security. Rules 12h-1(f) and (g) currently provide a much more limited exemption from registration for stock options issued under written compensation plans, and the new rules do not change or repeal this existing exemption. Instead, the final rules amend the definition of "held of record" to exclude securities received pursuant to an "employee compensation plan" in transactions exempt from Section 5 of the 1933 Act. The definition also excludes securities received in exchange for such securities (pursuant to a business combination or otherwise), provided the recipient was entitled to receive securities under Rule 701(c) promulgated under the 1933 Act at the time the *original* securities were issued. Rule 701(c) identifies the conditions under which certain issuances of securities under a written compensatory benefit plan will be exempt from registration under the 1933 Act.

The rules do not define "employee compensation plan," but they do provide a nonexclusive safe harbor: A person will be deemed to have received securities pursuant to an employee compensation plan if the conditions of Rule 701(c) are satisfied. In addition, solely for purposes of Section 12(g), an issuance will be deemed exempt from registration under the 1933 Act if the issuer had a reasonable belief at the time of the issuance that the securities were so exempt.

The Commission release clarifies that, where an employee is deemed not to be a holder of record under the new rules, family members who receive securities as a result of the employee's gift, domestic relations order or death will likewise not be deemed holders of record.

Effect of the Rules on Foreign Private Issuers

Rule 12g3-2(a) currently provides that a foreign private issuer's securities shall be exempt from registration if it has fewer than 300 holders resident in the United States. For purposes of Rule 12g3-2(a), foreign private issuers may rely on the new exemption to the definition of "holders of record" in determining their number of U.S. holders. However, U.S. employees who fall under this exemption must continue to be counted for purposes of determining the percentage of outstanding voting securities held by U.S. residents, which will determine whether an issuer is a foreign private issuer in the first place.

Effective Date

The rules become effective on June 9, 2016.

This is 30 days after publication in the Federal Register, which occurred on May 10, 2016.

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