Simpson Thacher

Memorandum

SEC Proposes Changes to Exchange Act Registration Requirements

January 14, 2015

On December 17, 2014, the Securities and Exchange Commission ("SEC") proposed changes to its rules to implement Title V and Title VI of the Jumpstart Our Business Startups Act (the "JOBS Act").[1] Highlights of the proposed rules include:

- increased asset and security-holder thresholds before registration is required under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act"), consistent with the JOBS Act;
- a revised definition of "held of record" in Exchange Act Rule 12g5-1, under which securities granted under an "employee compensation plan" in reliance on an exemption from registration under the Securities Act of 1933 (the "Securities Act") or under a "no sale" transaction are ignored when determining whether registration under the Exchange Act is required; and
- a related non-exclusive safe harbor in Exchange Act Rule 12g5-1 such that securities granted pursuant to a compensatory benefit plan under Securities Act Rule 701(c) will be deemed to have been granted under an employee compensation plan and thus not considered to be "held of record" for Exchange Act registration requirements.[2]

The SEC set a 60-day period for comment on these proposed rule amendments.

[1] *See* *Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act*, Release No. 33-9693; 34-73876; File No. S7-12-14 (Dec. 17, 2014).

[2] Applying the safe harbor means that equity granted under a compensatory benefit plan will not count against the 2,000/500 holder of record limit that could otherwise trigger the requirement to register.

I. Proposed Rule Changes Relating to Amended Exchange Act Registration and Reporting Thresholds

A. Proposed Amendments Reflecting Increased Thresholds

The JOBS Act changed the registration, termination of registration and suspension of reporting thresholds under Sections 12(g) and 15(d) of the Exchange Act. The SEC is currently proposing changes to the corresponding Exchange Act rules to reflect these higher registration and reporting thresholds.

1. Registration Thresholds

Before the JOBS Act was enacted, Section 12(g) of the Exchange Act mandated the registration of a class of 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 $1 million." The JOBS Act relaxed the registration requirements so as to only require registration of a class of equity securities if the issuer has total assets of more than $10 million 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. In addition, the JOBS Act amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or bank holding company to register a class of equity securities only if the issuer has total assets of more than $10 million and the class of equity securities is "held of record" by 2,000 persons. In light of these amendments, the SEC is proposing corresponding changes to Rule 12g-1 under the Exchange Act.

2. Termination of Section 12(g) Registration Thresholds

The JOBS Act also amended Section 12(g)(4) of the Exchange Act to allow an issuer that is a bank or a bank holding company to terminate the registration of a class of securities under Section 12(g) if that class is held of record by less than 1,200 persons. Before the enactment of the JOBS Act, any issuer (whether or not a bank or bank holding company) could terminate the Section 12(g) registration of a class of equity securities only 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 $10 million at the end of each of its last three fiscal years. The JOBS Act did not affect the statutory threshold for termination of registration for issuers other than banks or bank holding companies.

The SEC is proposing conforming changes to Rules 12g-2, 12g-3 and 12g-4. Each of the proposed amended rules adds reference to the new 1,200-person holder of record threshold for banks and bank holding companies. In addition, the proposed change to Rule 12g-4 would allow banks and bank holding companies relying on the new 1,200-holder threshold to terminate their Section 12(g) registration and cease filing reports required by Section 13(a) immediately upon the filing of a Form 15 certification, as other filers may currently do under the existing rule. Without the proposed amendment, banks and bank holding companies would be left relying on Section 12(g)(4), which requires them to wait 90 days after filing a Form 15 certification in order to terminate their Section 12(g) registration and suspend their Section 13(a) filing obligations.

3. Suspension of Section 15(d) Reporting Thresholds

Separate from the requirements under Exchange Act Section 12(g), pursuant to Exchange Act Section 15(d) an issuer with an effective Securities Act registration statement is obligated to file similar periodic Exchange Act reports. Before the JOBS Act was passed, an issuer's reporting obligation was automatically suspended under Section 15(d)(1) 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. Section 601 of the JOBS Act amended Exchange Act Section 15(d)(1) in a manner similar to Exchange Act Section 12(g)(4) to allow a bank or a bank holding company issuer to suspend reporting if that class of securities is held of record by less than 1,200 persons. The JOBS Act did not amend the Section 15(d) statutory threshold for suspension of reporting for issuers that are not banks or bank holding companies.

Consistent with the JOBS Act's amendments to Section 15(d), the SEC is proposing to revise Rule 12h-3 to permit banks and bank holding companies to immediately suspend their Section 15(d) reporting obligations upon the filing of a Form 15 certification at any point during a fiscal year when the related class of securities is held of record by less than 1,200 persons. Currently, under Exchange Act Section 15(d)(1), banks and bank holding companies may use the higher thresholds only when seeking to suspend a Section 15(d) obligation on the first day of a fiscal year.

B. Application of Higher Thresholds to Savings and Loan Holding Companies

While savings and loan holding companies are not covered by Title VI of the JOBS Act, the SEC is additionally proposing to apply Title VI's increased thresholds for banks and bank holding companies relating to registration, termination of registration and suspension of reporting to savings and loan holding companies. The SEC reasons that, without this parity, there would be "inconsistent treatment among depository institutions, resulting in different registration requirements for savings and loan holding companies that otherwise provide services similar to those provided by banks and bank holding companies and are generally subject to similar bank regulatory supervision requirements."

C. Determination of Accredited Investors

For purposes of making accredited investor determinations under Section 12(g)(1), the SEC proposes to apply the definition of "accredited investor" in Securities Act Rule 501(a). The SEC proposes, however, that "[t]he 'accredited investor' determination would be made as of the last day of the fiscal year rather than at the time of the sale of the securities." Under the proposed rules, following the completion of an offering in which an issuer sold securities to accredited investors, the issuer would not necessarily be required to periodically assess each investor's continued status as an accredited investor; rather, "an issuer will need to determine, based on facts and circumstances, whether it can rely upon prior information to form a reasonable basis for believing that the security holder continues to be an accredited investor as of the last day of the fiscal year." However, recognizing the dissimilarities between the contexts in which accredited

investor determinations are made under the Securities Act and Section 12(g)(1), the SEC is soliciting comment on "whether a different approach would be appropriate for determining accredited investor status under Section 12(g)."

II. Proposed Rule Amendments to Implement the Definition of "Held of Record" and Adopt a Safe Harbor for Determining Holders of Record

As amended by the JOBS Act, Section 12(g)(5) of the Exchange Act provides that "[f]or purposes of determining whether an issuer is required to register a security with the Commission pursuant to [Section 12(g)(1)], 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 exempted from the registration requirements of Section 5 of the Securities Act." Pursuant to the mandate of Section 503 of the JOBS Act, the SEC is proposing to amend the definition of "held of record" in Exchange Act Rule 12g5-1 to implement the statutory exclusion in Section 12(g)(1) and to adopt a safe harbor that issuers can use when determining whether holders of their securities received them pursuant to an employee compensation plan in exempt transactions. In so doing, the SEC does not formulate a new definition for the term "employee compensation plan" (which is not defined in Section 12(g)(5)); rather, the SEC's proposed amendments to Rule 12g5-1 rely on the current definition of "compensatory benefit plan" and conditions set forth in Securities Act Rule 701(c).[3]

A. Definition of "Held of Record"

The SEC proposes to amend the definition of "held of record" in Exchange Act Rule 12g5-1 to provide that in assessing whether an issuer is required to register a class of equity securities pursuant to 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 the registration requirements of Section 5 of the Securities Act or that did not involve a sale within the meaning of Section 2(a)(3) of the Securities Act; or
- held by persons eligible to receive securities from the issuer pursuant to Securities Act Rule 701(c) who received the securities in a transaction exempt from the registration requirements of Section 5 of the Securities Act in exchange for securities excludable under the proposed definition.

With regard to the first of these alternatives, the SEC explains that while the JOBS Act refers to "transactions exempted" from Securities Act Section 5 requirements, the proposed rule amendments include securities issuances to employees that do not trigger the registration requirement of Section 5, since such issuances are

[3] Under Securities Act Rule 701(c)(2), "compensatory benefit plan" is defined as "any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan."

similarly awarded for a compensatory purpose. The second of the alternatives in proposed Rule 12g5-1, according to the SEC, "is intended to facilitate the ability of an issuer to conduct restructurings, business combinations and similar transactions that are exempt from Securities Act registration so that if the securities being surrendered in such a transaction would not have been counted under the proposed definition of 'held of record,' the securities issued in exchange also would not be counted under this definition."

B. Safe Harbor for Determining Holders of Record

As directed by Section 503 of the JOBS Act, the SEC is also proposing to adopt a non-exclusive safe harbor under proposed Rule 12g5-1 that provides that "a person will be deemed to have received the securities pursuant to an employee compensation plan if such person received them pursuant to a compensatory benefit plan in transactions that met the conditions of Securities Act Rule 701(c)." The safe harbor would be available for:

- the plan participants listed in Rule 701(c), including employees, directors, general partners, trustees (where the issuer is a business trust), officers and certain consultants and advisors; and
- individuals meeting the rule's definition of "family members" who acquire the securities from a plan participant via gift or domestic relations order or "in connection with options transferred to them by the plan participant through gifts or domestic relations orders."

In the event that any of the covered individuals subsequently transfer the securities, however, under the proposed rule the securities would be considered held of record by the transferee for the purposes of determining whether the issuer is subject to Section 12(g)(1)'s registration and reporting requirements.

Finally, because Rule 12g3-2 directs foreign private issuers to the definition of "held of record" in Rule 12g5-1, the proposed rules allow foreign private issuers 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).

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at (212) 455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm's Public Company Advisory Practice, or **Paul R. Koppel** of the Firm's Executive Compensation and Employee Benefits Practice at (212) 455-2341 or pkoppel@stblaw.com.

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1 212-455-2000

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1 713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1 310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1 650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1 202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44 (0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86 10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852 2514-7600

Seoul
West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82 2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81 3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55 11-3546-1000