



Alerts

JOBS Act - Changes in Registration Thresholds

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Hinshaw Alert

On March 8, 2012, the U.S. House of Representatives approved a package of six bills designed to boost access to private capital – the JOBS Act. The JOBS Act was passed by the Senate on March 22, 2012 with some revisions. The House approved the Senate version on March 27, 2012. President Obama signed the JOBS Act on April 5, 2012.

The JOBS Act increases the number of shareholders a company must have before becoming subject to the SEC's reporting and disclosure rules, eases restrictions on the sale of securities and provides that "emerging growth companies" will be exempt from certain financial disclosure and governance requirements for up to five years. A memo discussing the JOBS Act may be found at <http://www.hinshawlaw.com/congress-passes-jobs-act-in-effort-to-make-raising-capital-easier-04-02-2012/>.

On April 11, 2012, the SEC's Division of Corporation Finance issued a FAQ to provide guidance on how these amendments affect the requirement of companies, including bank holding companies (BHCs), to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the 1934 Act). In addition, the FAQ: (a) addresses the ability of BHCs to deregister a class of equity securities under Section 12(g) or to suspend a reporting obligation under Section 15(d) of the 1934 Act; and (b) provides that when counting holders of record a company may exclude 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 of 1933 (the 1933 Act).

Prior to the enactment of the JOBS Act, BHCs (like all companies) with more than 500 holders of record and \$10 million in assets had to register their securities with the SEC and file periodic reports (10-Ks, 10-Qs and 8-Ks) and proxy statements and other materials with the SEC. In addition, certain persons (insiders and principal shareholders) had to report transactions on Forms 3, 4, and 5 and Schedules 13D and 13G. Furthermore, a BHC could only deregister a class of equity securities under Section 12(g) when such class of equity securities was held of record by less than 300 persons.

The JOBS Act amended Section 12(g) and Section 15(d) of the 1934 Act as follows:

- The Section 12(g) registration obligation for banks and BHCs, as of any fiscal year-ending after April 5, 2012, arises when the bank or BHC has a

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class of equity securities held of record by 2,000 or more persons.

- The number of holders of record threshold for Section 12(g) deregistration for banks and BHCs has been increased from 300 to 1,200 persons. Thus, a bank or BHC with fewer than 1,200 holders of record can opt out of its Section 12(g) obligations.
- The number of holders of record threshold for the suspension of reporting under Section 15(d) of the 1934 Act for banks and BHCs has been increased from 300 to 1,200 persons. As a consequence, a BHC with fewer than 1,200 holders of record can opt out of its Section 15(d) obligations.
- For companies (other than banks and BHCs) the number of holders of record threshold for Section 12(g) registration has been raised from 500 or more persons to either (a) 2,000 or more persons or (b) 500 or more persons who are not accredited investors.
- In calculating the number of holders of record for purposes of determining whether Section 12(g) registration is required, companies (including banks and BHCs) may exclude persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the 1933 Act. The SEC's Rule 701 exempts securities offered to employees under written benefit plans from the registration requirements of Section 5 of the 1933 Act provided the company is not registered with the SEC.
- Persons acquiring shares in a crowdfunding transaction (now permitted by the JOBS Act) are not deemed holders of record.

Bank Holding Companies – Registration Threshold

Section 12(g) Registration. Under Section 12(g)(1)(B) of the 1934 Act, a BHC will have a Section 12(g) registration obligation if, as of any fiscal year-ending after April 5, 2012, it has: (a) total assets of more than \$10 million; and (b) a class of equity securities held of record by 2,000 or more persons. This provision, in the SEC's view, eliminates for BHCs any Section 12(g) registration obligation with respect to a class of equity securities as of a fiscal year-ending *on or before* April 5, 2012. As a consequence, if a BHC had a Section 12(g) registration obligation as of April 5, 2012 because it had more than 500 but fewer than 2,000 holders of record, it need not register with the SEC. In addition, if a BHC has filed a 1934 Act registration statement that is not yet effective, it may withdraw the registration statement, provided it has fewer than 2,000 holders of record. If, however, a BHC has registered a class of equity securities under Section 12(g), it would need to continue to comply with the SEC's rules unless it is eligible to deregister under Section 12(g) or current rules (see discussion below at Bank Holding Companies – *Deregistration Threshold*).

Counting Record Holders. When counting record holders, a BHC would exclude persons who acquired shares in crowdfunding transactions and current and former employees who have received shares pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the 1933 Act (see discussion below at Exclusion of Employees who Receive Securities Pursuant to Employee Compensation Plans as Holders of Record).

Bank Holding Companies – Deregistration Threshold

Section 12(g) Deregistration. If the class of equity securities is held of record by less than 1,200 persons, a BHC may file a Form 15 to terminate the Section 12(g) registration. The SEC's Form 15 has not yet been amended to reflect the change to Section 12(g)(4) of the 1934 Act. As a consequence, a BHC should include an explanatory note in its Form 15 indicating that it is relying on Section 12(g)(4) to terminate its duty to file reports with respect to that class of equity security.

The Section 12(g) registration will terminate 90 days after the BHC files the Form 15. The BHC is required to file all reports required by Sections 13(a), 14 and 16 of the 1934 Act during that 90-day period.

A Rule 12g-4 under the 1934 Act permits the immediate suspension of Section 13(a) reporting obligation upon filing a Form 15. A BHC could rely on this Rule if it meets the requirements of that Rule. Rule 12g-4 has not yet been amended to incorporate the new 1,200 holder deregistration threshold.



Section 15(d) Deregistration. A BHC must consider whether it has a reporting obligation under Section 15(d) of the 1934 Act. The Section 15(d) reporting obligation is suspended for so long as the BHC has a class of securities registered under Section 12. Therefore, when a BHC terminates its Section 12 registration, it must address any Section 15(d) obligation that would apply once the Section 15(d) suspension has been lifted.

For its current fiscal year, a BHC can suspend its obligation to file reports under Section 15(d) with respect to a class of security: (a) that was sold pursuant to a registration statement filed under the 1933 Act; and (b) that was held of record by less than 1,200 persons as of the first day of the current fiscal year. In the SEC's opinion, this suspension would be deemed to have occurred as of the beginning of the fiscal year. If, during the current fiscal year, a BHC has a registration statement that becomes effective or is updated pursuant to Section 10(a)(3) of the 1933 Act, then it will have a Section 15 (d) reporting obligation for the current fiscal year. It will be able to terminate this obligation in 2013 provided it has fewer than 1,200 holders of record.

If a BHC with a class of security held of record by less than 1,200 persons as of the first day of the current fiscal year has a registration statement that is updated during the current fiscal year pursuant to Section 10(a)(3) of the 1933 Act, but under which no sales have been made during the current fiscal year, the BHC may be eligible to seek no-action relief to suspend its Section 15(d) reporting obligations.

Counting Record Holders. When counting record holders, a BHC would exclude persons who acquired shares in crowdfunding transactions and current and former employees who have received shares pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the 1933 Act (see discussion below at Exclusion of Employees who Receive Securities Pursuant to Employee Compensation Plans as Holders of Record).

Board Decision. Before electing to deregister a class of securities with the SEC, the BHC's board of directors should weigh the pros and cons of such a decision. Obviously, the deregistration would save considerable funds for the BHC. However, by participating in the SEC system, the BHC is providing information about its operations to its stockholders which it would not otherwise be required to provide. In addition, the board should determine whether such deregistration would impact the BHC's ability to be traded on national exchanges (e.g., Nasdaq).

Non-Bank Holding Companies – Registration Threshold

Section 12(g) Registration. If a company that is not a BHC is facing a Section 12(g) registration obligation as of a fiscal year-ending before April 5, 2012 because it has more than 500 holders of record, it would not have to register under Section 12(g) if it has fewer than (a) 2,000 or more holders of record or (b) 500 or more holders of record who are not accredited investors. If the company has filed a 1934 Act registration statement and the registration statement is not yet effective, the company may withdraw the registration statement. If the company has registered a class of equity securities under Section 12(g), it would need to continue that registration unless it is eligible to deregister under Section 12(g) or current rules.

Counting Record Holders. For purposes of determining whether a person is an accredited investor, the SEC has indicated that it presumes companies will know their shareholders and should be able to determine their status.

The SEC may issue rules instructing companies how to verify a person's status as an accredited investor.

When counting record holders, a company would exclude persons who acquired shares in crowdfunding transactions and current and former employees who have received shares pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the 1933 Act (see discussion below at Exclusion of Employees who Receive Securities Pursuant to Employee Compensation Plans as Holders of Record).

Exclusion of Employees who Receive Securities Pursuant to Employee Compensation Plans as Holders of Record

The JOBS Act requires the SEC to revise the definition of "held of record" to exclude, from the Section 12(g)(1) holder of record calculation, persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the 1933 Act. The SEC's Rule 701 exempts securities offered



to employees under written benefit plans from the registration requirements of Section 5 of the 1933 Act, provided the company is not registered with the SEC.

As of April 5, 2012, a company (including a BHC) when counting holders of record may exclude persons who received securities pursuant to an employee compensation plan in 1933 Act-exempt transactions whether or not the person is a current employee of the company. Transferees of current or former employees are not excluded. The JOBS Act directs the SEC to adopt “safe harbor provisions that companies can follow when determining whether holders of their securities received the securities pursuant to an employee compensation plan in transactions that were exempt from the registration requirements of” Section 5 of the 1933 Act. The SEC has determined that the lack of a safe harbor rules does not affect the application of Section 12(g)(5) of the 1934 Act.

For more information, please contact [Tim Sullivan](#), [Michael D. Morehead](#) or your regular [Hinshaw attorney](#).

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