



SEC Staff Guidance on JOBS Act Amendments to Exchange Act Registration Thresholds

On April 11, 2012, the Staff of the SEC's Division of Corporation Finance issued guidance in the form of Frequently Asked Questions on the implementation of Titles V and VI of the Jumpstart Our Business Startups Act ("JOBS Act"), which amended Sections 12(g) and 15(d) of the Securities Exchange Act of 1934, as amended ("Exchange Act").¹ The SEC Staff guidance specifically addressed questions relating to how these amendments affect the requirement of issuers, including bank holding companies ("BHCs"), to register a class of equity securities under Section 12(g) and 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).

Background

Prior to the recent amendments, Section 12(g) had required issuers to register a class of equity securities with the SEC if, on the last day of the issuer's fiscal year, such class of securities was held of record by 500 or more record holders and the issuer had total assets of more than \$10 million. After an issuer had registered under Section 12(g), all of the reporting requirements under the Exchange Act would apply, and the issuer would thus be required to file annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K and proxy statements on Schedule 14A, and certain persons would be required to report transactions on Forms 3, 4, and 5 and Schedules 13D and 13G. Furthermore, an issuer could 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, or by less than 500 persons and the total assets of the issuer had not exceeded \$10 million on the last day of each of the issuer's three most recent fiscal years.

New Exchange Act Registration Thresholds

Titles V and VI of the JOBS Act have now amended the prior record holder threshold by bifurcating it into two thresholds: one applicable generally to issuers regardless of their industry and the other applicable specifically to banks and BHCs. Title V amends Section 12(g)(1)(A) and provides that an issuer will become subject to Exchange Act requirements within 120 days after the last day of its first fiscal year ended on which the issuer has total assets in excess of \$10 million and a class of equity securities (other than exempted securities) held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. For these purposes, the "held of record" definition in Section 12(g)(5) does not include securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from the registration requirements under Section 5 of the Securities Act of 1933, as amended ("Securities Act"). Securities sold in exempt crowdfunding offerings under Title III of the JOBS Act are also excluded from the determination of record holders.

¹ See our client alert on the JOBS Act, available at <http://www.mofo.com/files/Uploads/Images/120326-The-JOBS-Act.pdf>.

Title VI also has added a new Section 12(g)(1)(B) that provides that, in the case of an issuer that is a bank or a BHC as defined in Section 2 of the Bank Holding Company Act of 1956, as amended, the issuer will become subject to Exchange Act requirements, not later than 120 days after the last day of its first fiscal year after the effective date of the amended section, on which the issuer has total assets exceeding \$10 billion and a class of equity securities (other than exempted securities) held of record by 2,000 or more persons. In the case of a bank or a BHC, the issuer will no longer be subject to reporting if the number of record holders falls below 1,200 persons.

The following table summarizes the various new Exchange Act registration thresholds.

	Companies other than banks and BHCs	Banks and BHCs
Total assets at fiscal year-end that trigger reporting requirement if shareholder trigger is breached	\$10 million	\$10 million
Total number of holders of record that trigger reporting	2,000 holders of record OR 500 non-accredited holders of record	2,000 holders of record
Total number of holders of record to exit reporting	300 or fewer holders of record	1,200 or fewer holders of record
Effectiveness	Immediately effective	At the end of the issuer's first fiscal year following enactment of the JOBS Act

SEC Staff Guidance

The SEC Staff guidance addressed five questions relating to how the JOBS Act amendments affect the requirement of issuers to register a class of equity securities under Section 12(g) and 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).

Question 1

The first question asked how amendments to Section 12(g)(1)(A) affect the obligations of issuers (other than BHCs) to register a class of equity securities under Section 12(g) where such obligations were triggered as of a fiscal year-end before April 5, 2012. In response, the SEC Staff indicated that if an issuer that is not a BHC triggered a Section 12(g) registration obligation with respect to a class of equity securities as of a fiscal year-end before April 5, 2012, but would not trigger such obligation under the amended record holder threshold, and the issuer has not yet registered that class of equity securities under Section 12(g), then the issuer would no longer be subject to a Section 12(g) registration obligation with respect to that class. Therefore, if the issuer has not filed an Exchange Act registration statement, the issuer would no longer be required to do so. However, if the issuer has filed an Exchange Act registration statement and the registration statement is not yet effective, then the issuer may withdraw the registration statement. Finally, if the issuer has registered a class of equity securities under Section 12(g), the issuer would need to continue that registration unless it is eligible to deregister under Section 12(g) or current rules.

Question 2

The second question asked how the amendments to Section 12(g)(1)(B) affect the obligations of BHCs to register a class of equity securities under Section 12(g) where such obligations were triggered as of a fiscal year-end on or before April 5, 2012. In response, the SEC Staff indicated that under Section 12(g)(1)(B), a BHC will have a Section 12(g) registration obligation if, as of any fiscal year-end after April 5, 2012, the BHC has total assets of more than \$10 million and a class of equity securities held of record by 2,000 or more persons. The SEC Staff also stated that the effect of the amendments would be to eliminate for BHCs any Section 12(g) registration obligation with respect to a class of equity securities as of a fiscal year-end on or before April 5, 2012. Therefore, if a BHC has filed an Exchange Act registration statement and the registration statement is not yet effective, then the BHC may withdraw the registration statement. Finally, if a BHC 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.

Question 3

The third question asked how a BHC terminates the registration of a class of equity securities under Section 12(g) on or after April 5, 2012. In response, the SEC Staff indicated that if the class of equity securities is held of record by fewer than 1,200 persons, the BHC may file a Form 15 to terminate the Section 12(g) registration of that class. However, because Form 15 has not yet been amended to reflect the change to Exchange Act Section 12(g)(4), a BHC must include an explanatory note in its Form 15 indicating that it is relying on Exchange Act Section 12(g)(4) to terminate its duty to file reports with respect to that class of equity securities. The SEC Staff also indicated that pursuant to Section 12(g)(4), the Section 12(g) registration will be terminated 90 days after the BHC files the Form 15. Until that termination date, the BHC is required to file all reports required by Exchange Act Sections 13(a), 14 and 16. Alternatively, a BHC could rely on Exchange Act Rule 12g-4, which has not yet been amended to incorporate the new 1,200 holder deregistration threshold and which permits immediate suspension of Section 13(a) reporting obligations upon filing a Form 15, if the BHC meets the requirements of that rule.

Question 4

The fourth question asked how a BHC can suspend its reporting obligations under Section 15(d) on or after April 5, 2012. In response, the SEC Staff indicated that, in general, the Section 15(d) reporting obligation is suspended if, and for so long as, the issuer has a class of securities registered under Section 12. When an issuer terminates its Section 12 registration, it must address any Section 15(d) obligation that would apply once the Section 15(d) suspension is lifted. For the current fiscal year, a BHC can suspend its obligation to file reports under Section 15(d) with respect to a class of securities that was sold pursuant to a Securities Act registration statement and that was held of record by less than 1,200 persons as of the first day of the current fiscal year. Such suspension would be deemed to have occurred as of the beginning of the fiscal year in accordance with Section 15(d), as amended by the JOBS Act. If, during the current fiscal year, a BHC has a registration statement that becomes effective or is updated pursuant to Securities Act Section 10(a)(3), then the BHC will have a Section 15(d) reporting obligation for the current fiscal year. If a BHC with a class of securities held of record by fewer 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 Securities Act Section 10(a)(3), 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 obligation. The SEC Staff also stated that such issuers should contact the Office of Chief Counsel for the Division of Corporation Finance for further information.

Question 5

The fifth question asked whether an issuer (including a BHC) may exclude from the revised "held of record" definition, prior to its effective date, 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, and if so,

whether an issuer also would be able to exclude former employees. In response, the SEC Staff indicated that as of April 5, 2012, an issuer (including a BHC) may exclude persons who received securities pursuant to an employee compensation plan in Securities Act-exempt transactions whether or not such persons are current employees of the issuer. The SEC Staff also stated that although Section 503 of the JOBS Act directs the SEC to adopt “safe harbor provisions that issuers 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 Securities Act of 1933,” the lack of a safe harbor does not affect the application of Exchange Act Section 12(g)(5).

Go to www.mofo.com/jumpstart for the latest developments regarding the JOBS Act.

Author

Ze'-ev Eiger
(212) 468-8222
zeiger@mofo.com

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