May 2016

SEC Adopts New Registration Thresholds

On May 3, 2016, the Securities and Exchange Commission ("SEC") issued final rules under Titles V and VI of the Jumpstart Our Business Startups Act (the "JOBS Act") and Title LXXXV of the Fixing America's Surface Transportation Act (the "FAST Act"). The final rules amend the SEC's record holder thresholds for registration, termination of registration and suspension of reporting under the Securities Exchange Act of 1934 (the "Exchange Act"). With this release, the SEC has completed all required rulemaking under the JOBS Act. The final rules will be effective 30 days after publication in the Federal Register.

Registration Threshold for Issuers Generally

Section 501 of the JOBS Act amended Section 12(g)(1) of the Exchange Act to provide that an issuer must register a class of equity securities under the Exchange Act within 120 days after its fiscal year end if, on the last day of that fiscal year, (1) its total assets exceed $10 million and (2) the class of securities is held of record by either 2,000 persons or 500 persons who are not "accredited investors."

Although the statutory amendments were effective immediately on the JOBS Act's enactment, they did not amend the SEC's related rules. The final rules now amend Rules 12g-1 through 12g-4 and Rule 12h-3 to make them consistent with the amended statutory language and to make other corrections. Importantly, the final rules (1) adopt the definition of "accredited investor" contained in Rule 501(a) of the Securities Act of 1933 (the "Securities Act") and (2) require issuers applying the standard to determine whether a record holder is an accredited investor as of the last day of each fiscal year.

Registration Threshold for Banks, Bank Holding Companies and S&L Holding Companies

The JOBS Act and FAST Act have special provisions that create unique Exchange Act registration requirements for banks, bank holding companies and savings and loan ("S&L") holding companies. Collectively, they require a bank, bank holding company or S&L holding company to register a class of equity securities under the Exchange Act within 120 days after its first fiscal year end if, on the last day of that fiscal year, (1) its total assets exceed $10 million and (2) the class of securities is held of record by 2,000 persons.

In addition, the two statutes permit a bank, bank holding company or S&L holding company to deregister a class of securities under Section 12(g) of the Exchange Act and suspend its Section 15(d) reporting obligations relating to that class of securities if the number of record holders of the class of security falls below 1,200 persons. Most other issuers remain subject to a 300-person deregistration threshold. The final rules reflect these adjusted Exchange Act thresholds for registration, termination of registration and suspension of reporting for banks, bank holding companies and S&L holding companies.

Employee Compensatory Shares Excluded from Record Holder Count

Section 502 of the JOBS Act amended Section 12(g)(5) of the Exchange Act to provide that, for purposes of determining whether it must register a class of equity securities under Section 12(g), an issuer may exclude from the definition of "held of record," securities held by persons who received them both under an "employee compensation plan and in transactions exempt from Securities Act registration.

The final rules amend Exchange Act Rule 12g5-1 to provide that when determining whether it is required to register a class of equity securities under Section 12(g), an issuer may exclude securities that are held by persons who either received them (1) under an employee compensation plan in transactions exempt from, or not subject to, Securities Act registration or (2) in a transaction exempt from, or not subject to, Securities Act registration from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for excludable securities under the new safe harbor, as long as the persons were eligible to receive securities under Securities Act Rule 701(c) at the time the excludable securities were originally issued to them. This latter condition is intended to provide some flexibility to issuers that engage in business combinations or similar transactions in which securities that would have been excludable under the new safe harbor are surrendered for other securities serving the same compensatory purpose as the surrendered securities.

Notably, this exclusion does not "follow the securities." Thus, once a security is transferred by the holder under the compensation plan (or by certain permitted transferees, like family members receiving securities pursuant to a domestic relations order), the securities will need to be counted as held of record by the transferee. In addition, the exclusion does not apply for purposes of determining whether an issuer may deregister a class of equity securities.

Additional Non-Exclusive Safe Harbor

The final rules also create a non-exclusive safe harbor under Rule 12g5-1(a)(8) under which a person will be considered to have received securities under an employee compensation plan if the plan and the person who received securities under the plan met the plan and participant conditions of Securities Act Rule 701(c). The new safe harbor also provides that an issuer may, solely for 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.

Contact

Scott H. Kimpel
skimpel@hunton.com