SEC ADOPTS AMENDMENTS TO EXCHANGE ACT REGISTRATION RULES TO CONFORM TO STATUTORY CHANGES MADE BY JOBS ACT AND FAST ACT

On May 3, 2016, the U.S. Securities and Exchange Commission (SEC) adopted amendments to its rules to revise the thresholds for registration, termination of registration and suspension of reporting under Section 12(g) of the Securities Exchange Act of 1934 (Exchange Act) to conform to the statutory changes made by the Jumpstart Our Business Startups Act (JOBS Act) and the Fixing America's Surface Transportation Act (FAST Act). With the revised thresholds, many non-SEC reporting companies may have greater flexibility to remain non-reporting and continue to raise capital in private offerings and issue equity compensation to employees before becoming a reporting company as a result of an initial public offering or registration under the Exchange Act. The rule amendments will become effective on June 9, 2016. The final rule release is available online at https://www.sec.gov/rules/final/2016/33-10075.pdf.

Revised Thresholds

To conform to the statutory changes made by the JOBS Act and the FAST Act, the SEC adopted amendments to Exchange Act Rules 12g-1, 12g-2, 12g-3, 12g-4 and 12h-3.

Higher Registration Threshold for Companies Generally

Under amended Exchange Act Rule 12g-1, a company (other than a bank, bank holding company or savings and loan holding company) is not required to register a class of equity securities pursuant to Section 12(g)(1) of the Exchange Act if, on the last day of its most recent fiscal year, the company had total assets not exceeding $10 million and the class was held of record by fewer than 2,000 persons or 500 persons who are not accredited investors (as compared to the previous single threshold of 500 persons). Under amended Exchange Act Rule 12g-1, in determining whether a person is an accredited investor or not, a company will need to make the determination as of the last day of its fiscal year and apply the definition of "accredited investor" set forth in Rule 501(a) under the Securities Act of 1933 (Securities Act), which definition incorporates a "reasonable belief" standard. The SEC decided not to provide specific guidance on how to establish a reasonable belief that a person is an accredited investor, as the SEC believes that adopting the existing reasonable belief standard under Rule 501(a) is sufficient.

For a company that is not a bank, bank holding company or savings and loan holding company, the amendments did not revise the threshold at which such a company is permitted to terminate its Section 12(g) registration of a class of equity securities (and immediately suspend its duty to file periodic and current Exchange Act reports). In this regard, the rules continue to provide that such a company is permitted to terminate its Section 12(g) registration of a class of equity securities (and immediately suspend its duty to file periodic and current Exchange Act reports) only if the class is held of record by (i) fewer than 300 persons or (ii) fewer than 500 persons, where the total assets of the company have not exceeded $10 million on the last day of each of the company's three most recent fiscal years.

Higher Registration, Termination and Suspension Thresholds for Banks, Bank Holding Companies and Savings and Loan Holding Companies

Under amended Exchange Act Rule 12g-1, a bank, a bank holding company (as defined in Section 2 of the Bank Holding Company Act of 1956) or a savings and loan holding company (as defined in section 10 of the Home Owners' Loan Act) is not required to register a class of equity securities pursuant to Section 12(g)(1) of the Exchange Act if, on the last day of its most recent fiscal year, the company had total assets not exceeding $10 million and the class was held of record by fewer than 2,000 persons (as compared to the previous threshold of 500 persons).

Under amended Exchange Act Rules 12g-2, 12g-3, 12g-4 and 12h-3, a bank, a bank holding company or a savings and loan holding company is permitted to terminate its Section 12(g) registration of a class of equity securities (and immediately suspend its duty to file periodic and current Exchange Act reports) if the class is held of record by (i) fewer than 1,200 persons (as compared to the previous threshold of 300 persons) or (ii) fewer than 500 persons, where the total assets of the company have not exceeded $10 million on the last day of each of the company's three most recent fiscal years.

Amendments to Definition of "Held of Record"

As directed by the JOBS Act, the SEC amended the definition of "held of record" by adopting new Exchange Act Rule 12g5-1(a)(8) so that a company, when determining whether it is required to register a class of equity securities under Section 12(g)(1) of the Exchange Act, may exclude securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from Securities Act registration.

Notably, the SEC chose not to define the term "employee compensation plan" for this purpose, but instead chose to establish a non-exclusive safe harbor that incorporates the conditions of Securities Act Rule 701(c), which exempts from registration under the Securities Act offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation. Under the safe harbor, a company may (i) deem a person to have received the securities pursuant to an employee compensation plan if the plan and the person who received the securities pursuant to the plan met the plan and participant conditions of Securities Act Rule 701(c) and (ii) deem such securities to have been issued in a transaction exempt from Securities Act registration if the company had a reasonable belief at the time of issuance that the securities were issued in such a transaction.

In addition, to facilitate the ability of companies to conduct restructurings, business combinations and similar transactions that are exempt from Securities Act registration and in which securities may be received in place of existing securities, Exchange Act Rule 12g5-1(a)(8) also allows a company, when determining whether it is required to register a class of equity securities under Section 12(g)(1) of the Exchange Act, to exclude securities held by persons who receive them in a transaction exempt from Securities Act registration from the company, a predecessor of the company, or an acquired company in substitution or exchange for excludable securities as securities received pursuant to an employee compensation plan, 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.

Foreign private issuers are permitted to rely on Exchange Act Rule 12g5-1(a)(8) when making their determination of the number of U.S. resident holders under Exchange Act Rule 12g3-2(a), which exempts a class of securities issued by a foreign private issuer that otherwise exceeds the asset and shareholder thresholds of Section 12(g) of the Exchange Act from registration under that section if the class is held by fewer than 300 holders resident in the United States. Companies, however, are not permitted to exclude securities held by employees in determining the percentage of the company's outstanding securities held by U.S. residents for purposes of determining whether the company qualifies as a foreign private issuer.

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