

The JOBS ACT: SEC Guidance on the Changes to the Registration and Deregistration Requirements under the Exchange Act

Ralph V. De Martino • 202.912.4825 • rdemartino@cozen.com

Cavas S. Pavri • 215.665.5542 • cpavri@cozen.com

Eileen T. Salimbene • 215.665.4779 • esalimbene@cozen.com

H.R. 3606, also known as the Jumpstart Our Business Startups Act (JOBS Act), was signed into law on April 5, 2012. Since its enactment, the Division of Corporate Finance (the Division) of the Securities and Exchange Commission (the Commission) has provided guidance on the implementation and application of the JOBS Act in light of its existing rules, regulations and procedures. This alert is the second in a series summarizing such guidance (To read the first Alert in this series, [click here](#)).

On April 11, 2012, the Division addressed frequently asked questions related to how the JOBS Act will affect an issuer's obligation (including bank holding companies) to register a class of equity securities under Section 12(g) of the Securities and Exchange Act of 1934 (the Exchange Act) and the ability of bank holding companies to deregister a class of equity securities under Section 12(g) or to suspend a reporting obligation under Section 15(d) of the Exchange Act. The JOBS Act amends Section 12(g) and Section 15(d) of the Exchange Act, which require issuers to register certain classes of securities and file periodic reports with the Commission, by raising the thresholds triggering registration and deregistration. Previously, Section 12(g) required issuers with more than \$10 million in total assets to register a class of equity securities that were issued to 500 or more shareholders of record. The JOBS Act amended Section 12(g) to increase this threshold to 2,000 shareholders of record (or 500 shareholders of record who are not accredited investors) and exclude employees who obtained company securities under an employee compensation plan from the shareholder of record calculation. As a result, companies that wish to stay private can accept more investors in pre-IPO offerings without fear that they will accidentally trigger the registration requirements under Section 12(g).

The following is the a summary of the Division's current understanding of how the amendments to Section 12(g) and Section 15(d) will affect the registration and deregistration requirements under the Exchange Act:

Registration Obligations

If an issuer that is not a bank holding company would have been required to register a class of equity securities under Section 12(g) as of a fiscal year ending before the enactment of the JOBS Act, but such registration obligation would not be triggered under the amended shareholders of record threshold, then the issuer is not required to register those securities with the Commission. If the issuer has already filed a registration statement for the securities but the registration statement is not yet effective, then the issuer may withdraw the registration statement. However, if the issuer has already registered the securities under Section 12(g), it has to continue that registration unless it is eligible to deregister.

Under amended Section 12(g), a bank holding company will only have a registration obligation if, as of any fiscal year-end after April 5, 2012, it has total assets of more than \$10 million and a class of equity securities held by 2,000 or more shareholders of record. This amendment effectively eliminates any registration obligation for a bank holding company that arose prior to April 5, 2012. If a bank holding company has filed a registration statement for the securities and the registration statement is not yet effective, then the bank holding company may withdraw the registration statement. However, if the securities have been registered under Section 12(g), the bank holding company must continue that registration unless it is eligible to deregister.

A bank holding company may terminate the registration of

a class of equity securities under Section 12(g) if such class is held of record by less than 1,200 persons by filing a Form 15 with the Commission. Since Form 15 has not yet been amended to reflect the changes implemented by the JOBS Act, a bank holding company 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. The registration will be terminated 90 days after the Form 15 is filed.

In determining whether an issuer meets the shareholder of record threshold under amended Section 12(g), an issuer may exclude from its calculations persons who received securities pursuant to an employee compensation plan prior to April 5, 2012, regardless of whether or not the person is a current employee.

Suspending Reporting Obligations

Prior to the enactment of the JOBS Act, the holders of record threshold for deregistration under Section 12(g) and the suspension of reporting under Section 15(d) was 300 persons. Amended Section 12(g) and Section 15(d) now provide that a bank holding company can deregister or suspend its obligations to file reports for the current fiscal year with respect to a class of securities that were sold pursuant to a registration statement if such securities were held by less than 1,200 shareholders of record as of the first day of the current fiscal year. Such suspension will be deemed to have occurred as of the beginning of the fiscal year. If a bank holding company has a registration statement that becomes effective or is updated during the current fiscal year, then it will not be eligible to suspend its reporting requirements. However, if the bank holding company

has a registration statement that is updated during the current fiscal year, but no sales have been made under such registration statement during the current fiscal year, it may be eligible to seek no-action relief from the Commission to suspend its reporting obligations.

Determination of Accredited Investor Status

Section 12(g) requires that the calculation of shareholders of record be completed at the beginning of each fiscal year in determining whether an issuer has reached the threshold for registration pursuant to such section. The Commission has not addressed whether an issuer will be obligated to re-determine its shareholder base every year with respect to the "accredited" nature of each shareholder. Stated differently, it is unclear whether an issuer that has determined an investor is accredited in connection with a private offering to such investor will be required to re-confirm the accredited nature of such shareholder each year in evaluating whether it complies with amended Section 12(g).

For the full text of the frequently asked questions, please [click here](#).

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

Eileen T. Salimbene at esalimbene@cozen.com or 215.665.4779.

Ralph V. De Martino at rdemartino@cozen.com or 202.912.4825.