

## **JOBS Act Establishes New Thresholds for Registration Under the Exchange Act**

Written by Paul Bork

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On April 5, 2012, the JOBS Act was signed into law, culminating a bipartisan effort by Congress to ease restrictions on capital raising that have affected and guided companies and investors for decades. This alert focuses on the changes effected by the JOBS Act to the registration and deregistration thresholds under the Securities Exchange Act of 1934 (the “Exchange Act”), and incorporates the additional guidance provided by the SEC Division of Corporation Finance on April 11, 2012, regarding certain practical implications of these changes for bank holding companies and non-bank issuers. These changes provide new opportunities for issuers to raise capital without registering under the Exchange Act and incurring the reporting and compliance obligations incident to registration.

### **Registration Under the Exchange Act**

Previously, a company with total assets exceeding \$10,000,000 with a class of equity security “held of record” by 500 or more holders was required to register under the Exchange Act, even if the company has never sold securities publicly. Registering under the Exchange Act subjects an issuer to filing annual and quarterly reports, to disclosure and to procedures with respect to solicitation of shareholder votes and effecting certain transactions with shareholders. The JOBS Act raises the registration threshold to 2,000 holders for banks and bank holding companies and to 500 non-accredited investors or 2,000 holders for other issuers. These increased thresholds allow companies to issue unregistered securities to an increased number of accredited investors, and, in the case of banks and bank holding companies, to unaccredited investors as well. The JOBS Act does not reference how changes in an investor’s accredited status should be handled, an issue which the SEC is likely to address in subsequent rule-making.

#### **Holders of Record**

The JOBS Act amends the definition of “held of record” to exclude securities held by persons who received such securities pursuant to an employee compensation plan in transactions exempt from the registration requirements of the Securities Act. The JOBS Act also directs the SEC to adopt safe harbor provisions to allow issuers to determine that securities are held by holders who received them pursuant to an employee compensation plan and that such securities were received in transactions exempt from the registration requirements of the Securities Act. A major unresolved issue, which is likely to be addressed by the SEC, is the extent to which holders of securities received pursuant to an employee compensation plan and subsequently transferred, through inheritance or otherwise, may properly be excluded. The Division of Corporation Finance indicated initially that holders of securities received pursuant to an employee compensation plan may be excluded although the holder’s employment with the issuer has ceased.

The term “held of record,” continues to disregard beneficial holders who hold securities through nominees, such as brokerage firms and banks, counting only the securities intermediaries in whose name the securities are held, although the SEC retains the authority to count the beneficial holders if the form in which the securities are held is knowingly used to circumvent registration. The JOBS Act commissions an SEC study to determine if additional enforcement tools are needed to enforce this substance-over-form authority.

#### **Effects on Pending Registration Obligations**

For an issuer with a registration obligation triggered as of a fiscal year-end before the passage of the JOBS Act (April 5, 2012) that would not trigger a registration obligation under the amended holders of record threshold in the JOBS Act, the Division of Corporation Finance indicated that (a) if the issuer had not filed an Exchange Act registration statement with respect to such securities, such issuer was no longer required to do so, (b) if the issuer had filed an Exchange Act registration statement, but such registration statement had not yet

become effective, such issuer could withdraw the registration statement and (c) if the issuer had filed a registration statement that became effective, such issuer would need to continue registration unless otherwise eligible to deregister.

## Crowd Funding

The JOBS Act directs the SEC within 270 days to adopt regulations that exclude securities issued pursuant to the newly established “crowd funding” exemption from the new thresholds. Once these regulations are promulgated, issuers of crowd funding securities will need to determine how to track securities, possibly through a separate CUSIP, so that their holders may be properly excluded.

## Deregistration Under the Exchange Act

The JOBS Act also lowers the threshold for Exchange Act deregistration for banks and bank holding companies. Previously, in order to deregister under the Exchange Act, an issuer was required to have fewer than 300 shareholders of record. For a bank or bank holding company, this threshold has been increased to fewer than 1,200 shareholders of record. The threshold remains at 300 shareholders of record for other issuers. Taken together, the adjusted thresholds for registration and deregistration allow banks and bank holding companies who met the \$10,000,000 asset test and crossed the 300 shareholder threshold before the passage of the JOBS Act and currently have less than 1,200 shareholders to deregister, but does not allow other issuers to take similar action.

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