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Final SEC Rule Amendments Increasing the Thresholds for Exchange Act Registration, Termination of Registration and Suspension of Reporting

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On May 3, 2016, the U.S. Securities and Exchange Commission (SEC) adopted rule amendments pursuant to sections 12(g) and 15(d) of the *Securities Exchange Act of 1934*, as amended (Exchange Act) to implement higher thresholds for registration, termination of registration and suspension of reporting obligations under the Exchange Act. The rule amendments were adopted under the *Jumpstart Our Business Startups Act* and the *Fixing America's Surface Transportation Act* to reduce the regulatory burden of private companies and provide more flexibility for their capital raising.

Increased Thresholds for Registration and Reporting Requirements

An issuer that is not a bank, bank holding company or savings and loan holding company (Bank) is required to register a class of equity securities under the Exchange Act if, on the last day of its fiscal year, the issuer has more than $10 million of total assets and such class of securities is held of record by either (i) 2,000 persons or (ii) 500 persons who are not accredited investors.[1] An issuer that is a Bank is required to register a class of equity securities under the Exchange Act if, on the last day of its fiscal year, the issuer has more than $10 million of total assets and such class of securities is held of record by 2,000 or more persons (without regard to accredited investor status). Before the rule amendment, the threshold for registration under the Exchange Act for all issuers was set at 500 persons (without regard to accredited investor status). Foreign private issuers are exempt from registration under the Exchange Act if the class of securities is held of record by fewer than 300 U.S. residents.

Increased Thresholds for Termination of Registration and Suspension of Reporting

An issuer that is a Bank may terminate the registration of a class of securities under section 12(g) of the Exchange Act or suspend the registration of its reporting obligations under section 15(d)(1) of the Exchange Act if such class of securities is held of record by fewer than 1,200 persons (as opposed to the 300-person threshold that was in effect prior to the rule amendment). An issuer that is not a Bank remains subject to the 300-person threshold for termination of registration and suspension of reporting.

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[1] The definition of "accredited investors" in Rule 501(a) under the *Securities Act of 1933* applies when determining whether the shareholder threshold has been met. The determination must be made as of the last day of the issuer's fiscal year rather than at the time of sale of the securities.

Exclusion of Securities from the Definition of "Held of Record"

The definition of "held of record" excludes (i) securities held by persons who received them pursuant to an employee compensation plan in transactions exempted from the registration requirements of section 5 of the Securities Act; and (ii) securities held by persons who received them in a transaction exempt from, or not subject to, the registration requirements of section 5 of the *Securities Act of 1933*, as amended (Securities Act) from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for securities that are excluded under clause (i) above, as long as the persons were eligible to receive securities pursuant to Rule 701(c) under the Securities Act at the time the excludable securities were originally issued to them.[2] With the second prong of the definition, the SEC aims to facilitate the ability of an issuer to conduct restructurings, business combinations and similar transactions that are otherwise exempted from registration under the Securities Act by deeming the securities issued in such an exchange to have had a compensatory purpose as long as the surrendered securities would not have counted as "held of record" at the time they were issued.

The term "employee compensation plan" is not defined. Instead, the rule includes a non-exclusive safe harbour to help issuers determine holders of record by allowing an issuer (i) to deem a person to have received the securities under an employee compensation plan if the plan and the person who received the securities under the plan met the conditions of Rule 701(c) under the Securities Act; and (ii) to deem, for the purposes of section 12(g) only, that the securities had 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 reasonable belief at the time of the issuance that the securities were issued in such a transaction.

Foreign private issuers may rely on the safe harbour solely for the purpose of determining the number of U.S. resident holders of record. However, the safe harbour does not apply for the purposes of determining foreign private issuer status, which means that securities held by employees of a foreign private issuer will continue to be counted when calculating the percentage of an issuer's outstanding securities held by U.S. residents.

If you have any questions regarding the foregoing, please contact Jeffrey Nadler (212.588.5505) in our New York office.

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[2] Rule 701 provides an exemption from registration under the Securities Act for offers and sales of securities pursuant to an eligible compensatory benefit plan, which is defined as a purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan. The exemption is available to any issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, and that is not an investment company registered or required to be registered under the *Investment Company Act of 1940*.