

**Corrected to Conform to the Federal Register Version**

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 230 and 240**

**[Release No. 33-10075; 34-77757; File No. S7-12-14]**

**RIN 3235-AL40**

**Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are amending our rules in light of the statutory changes made by Title V and Title 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 amendments revise our rules to reflect the new, higher thresholds for registration, termination of registration and suspension of reporting that were set forth in the JOBS Act and the FAST Act. In addition, the amendments revise the definition of “held of record” in Rule 12g5-1 under the Securities Exchange Act of 1934 (the “Exchange Act”), in accordance with the JOBS Act, to exclude certain securities held by persons who received them pursuant to employee compensation plans and establish a non-exclusive safe harbor for determining whether securities are “held of record” for purposes of registration under Exchange Act Section 12(g).

**DATES:** Effective [insert date 30 days after publication in the Federal Register].

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**SUPPLEMENTARY INFORMATION:** We are adopting amendments to Rules 3b-4,<sup>1</sup> 12g-1,<sup>2</sup> 12g-2,<sup>3</sup> 12g-3,<sup>4</sup> 12g-4,<sup>5</sup> 12g5-1,<sup>6</sup> and 12h-3<sup>7</sup> under the Exchange Act<sup>8</sup> and amendments to Rule 405<sup>9</sup> under the Securities Act of 1933 (the “Securities Act”).<sup>10</sup>

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<sup>1</sup> 17 CFR 240.3b-4.

<sup>2</sup> 17 CFR 240.12g-1.

<sup>3</sup> 17 CFR 240.12g-2.

<sup>4</sup> 17 CFR 240.12g-3.

<sup>5</sup> 17 CFR 240.12g-4.

<sup>6</sup> 17 CFR 240.12g5-1.

<sup>7</sup> 17 CFR 240.12h-3.

<sup>8</sup> 15 U.S.C. 78a et seq.

<sup>9</sup> 17 CFR 230.405.

<sup>10</sup> 15 U.S.C. 77a et seq.

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I. INTRODUCTION

On December 17, 2014, we proposed amendments<sup>11</sup> to implement Title V and Title VI of the JOBS Act.<sup>12</sup> The JOBS Act amended Sections 12(g)<sup>13</sup> and 15(d)<sup>14</sup> of the Exchange Act to adjust the thresholds for registration, termination of registration and suspension of reporting.<sup>15</sup> Specifically, Section 501 of the JOBS Act<sup>16</sup> amended Section 12(g)(1) of the Exchange Act<sup>17</sup> to require an issuer to register a class of equity securities (other than exempted securities) within 120 days after its fiscal year-end if, on the last day of its fiscal year, the issuer has total assets of more than \$10 million and the class of equity securities is “held of record” by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. Section 601 of the JOBS Act<sup>18</sup> further amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or a bank holding company, as

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<sup>11</sup> Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, Release No. 33-9693 (Dec. 17, 2014) [79 FR 78343 (Dec. 30, 2014)] (the “Proposing Release”).

<sup>12</sup> Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012).

<sup>13</sup> 15 U.S.C. 78l(g).

<sup>14</sup> 15 U.S.C. 78q(d).

<sup>15</sup> The changes to Exchange Act Sections 12(g)(1), 12(g)(4) and 15(d)(1) were effective upon enactment of the JOBS Act and do not require any Commission action.

<sup>16</sup> Sec. 501, 126 Stat. at 325.

<sup>17</sup> 15 U.S.C. 78l(g)(1).

<sup>18</sup> Sec. 601, 126 Stat. at 326.

defined in Section 2 of the Bank Holding Company Act of 1956,<sup>19</sup> to register a class of equity securities (other than exempted securities) within 120 days after the last day of its first fiscal year ended after the effective date of the JOBS Act, on which the issuer has total assets of more than \$10 million and the class of equity securities is “held of record” by 2,000 or more persons. Section 601 of the JOBS Act also amended Exchange Act Section 12(g)(4)<sup>20</sup> and Exchange Act Section 15(d)(1)<sup>21</sup> to enable an issuer that is a bank or a bank holding company to terminate the registration of a class of securities under Section 12(g) or suspend reporting under Section 15(d)(1) if that class is held of record by less than 1,200 persons.<sup>22</sup> For other issuers, the threshold in Section 12(g)(4) for termination of registration and in Section 15(d)(1) for suspension of reporting remained at 300.<sup>23</sup> In addition, Section 502 of the JOBS Act<sup>24</sup> amended Exchange Act Section 12(g)(5)<sup>25</sup> to exclude from the definition of “held of record,” for the purposes of determining whether an issuer is required to register a class of equity securities, securities that are 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.<sup>26</sup> Section 503 of the JOBS Act<sup>27</sup> directed the Commission to revise the definition of “held of record” pursuant to Exchange Act Section 12(g)(5) to implement

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<sup>19</sup> 12 U.S.C. 1841.

<sup>20</sup> 15 U.S.C. 78l(g)(4).

<sup>21</sup> 15 U.S.C. 78o(d)(1).

<sup>22</sup> See supra note 18.

<sup>23</sup> See 15 U.S.C. 78l(g)(4) and 15 U.S.C. 78o(d)(1).

<sup>24</sup> Sec. 502, 126 Stat. at 326.

<sup>25</sup> 15 U.S.C. 78l(g)(5).

<sup>26</sup> 15 U.S.C. 77e.

<sup>27</sup> Sec. 503, 126 Stat. at 326.

the amendment made by Section 502 of the JOBS Act, and to create a safe harbor for issuers when determining whether holders received their securities pursuant to an “employee compensation plan” in a transaction exempted from the registration requirements of Section 5 of the Securities Act.

Subsequent to our proposal, Section 85001 of the FAST Act<sup>28</sup> adjusted the Exchange Act thresholds for registration, termination of registration and suspension of reporting for savings and loan holding companies, as defined in Section 10 of the Home Owners’ Loan Act,<sup>29</sup> so that they would be the same as the thresholds for banks and bank holding companies. This change also was effective upon enactment.

In connection with the amendments made by Title V and Title VI of the JOBS Act and Title LXXXV of the FAST Act, we are amending our rules to reflect the new, higher registration, termination of registration and suspension of reporting thresholds under amended Exchange Act Sections 12(g)(1), 12(g)(4) and 15(d)(1). We are also amending Exchange Act Rule 12g5-1 to reflect the amendment to Exchange Act Section 12(g)(5) and to establish a non-exclusive safe harbor that issuers may follow when determining if 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 may be excluded when determining whether they are required to register under Exchange Act Section 12(g)(1).

The comment period for the proposed amendments closed on March 2, 2015. We received 11 comment letters on the Proposing Release, which generally supported the

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<sup>28</sup> Pub. L. No. 114-94 (Dec. 4, 2015).

<sup>29</sup> 12 U.S.C. 1461.

proposals.<sup>30</sup> We have reviewed and considered all of these comments. We are adopting the amendments substantially as proposed, and discuss these amendments and any modifications or clarifications in detail below.

## **II. AMENDMENTS RELATING TO EXCHANGE ACT REPORTING THRESHOLDS**

### **A. Application of the Increased Thresholds for Registration and Reporting Obligations**

Sections 501 and 601 of the JOBS Act amended the Exchange Act to raise the total assets and held of record thresholds under which issuers are required to register or permitted to terminate registration or suspend reporting pursuant to Section 12(g) and 15(d) of the Exchange Act. Section 85001 of the FAST Act further amended these provisions to apply the new statutory thresholds for banks and bank holding companies to savings and loan holding companies.

#### **1. Proposed Rule Amendments**

To harmonize our rules with the statutory changes made to Exchange Act Sections 12(g)(1), 12(g)(4) and 15(d), we proposed amendments to Exchange Act Rules 12g-1, 12g-2, 12g-3, 12g-4 and 12h-3, the rules that govern the mechanics relating to registration, termination of registration under Section 12(g) and suspension of reporting obligations under Section 15(d). These rules generally reflected the holder of record statutory thresholds in Sections 12(g) and 15(d) prior to the enactment of the JOBS Act.<sup>31</sup>

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<sup>30</sup> We also considered pre-proposal comment letters when formulating the proposed amendments. Pre-proposal comment letters received on Title V of the JOBS Act are available at <http://www.sec.gov/comments/jobs-title-v/jobs-title-v.shtml> and on Title VI of the JOBS Act at <http://www.sec.gov/comments/jobs-title-vi/jobs-title-vi.shtml>.

<sup>31</sup> Prior to adoption of the JOBS Act, the Commission used its general exemptive authority to provide for a \$10 million asset threshold by rule. JOBS Act Section 501 amended Exchange Act Section 12(g)(1) to raise the statutory threshold from \$1 million to \$10 million to match the threshold previously provided in Exchange Act Rule 12g-1.

We proposed to revise Rule 12g-1 to reflect the asset and holder of record thresholds established by Titles V and VI of the JOBS Act relating to the requirement to register a class of equity securities under the Exchange Act.<sup>32</sup> Similarly, we proposed to revise Exchange Act Rules 12g-2<sup>33</sup> and 12g-3<sup>34</sup> to reflect the holders of record thresholds in the Exchange Act, as amended by the JOBS Act, for terminating registration and suspending reporting for banks and bank holding companies. In addition, we proposed to amend Exchange Act Rules 12g-4 and 12h-3, the rules which permit issuers to immediately suspend their duty to file periodic and current reports, to reflect the new thresholds in Sections 12(g) and 15(d) enacted by the JOBS Act for banks and bank holding companies.

In light of the fact that savings and loan holding companies provide similar services to banks and bank holding companies and are generally subject to similar bank regulatory and supervision requirements, we also proposed to use our general exemptive authority to apply the same registration thresholds applicable to banks and bank holding companies to savings and loan holding companies and to revise our rules accordingly. As noted above, subsequent to this proposal, the FAST Act amended the Exchange Act to

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<sup>32</sup> We also proposed to remove the reference to an automated inter-dealer quotation system since the NASDAQ Stock Market is now registered as a securities exchange with the Commission. See In the Matter of the Application of the Nasdaq Stock Market LLC for Registration as a National Securities Exchange: Findings, Opinion and Order of the Commission, Release No. 34-53128 (Jan. 13, 2006) [71 FR 3550 (Jan. 23, 2006)].

<sup>33</sup> Rule 12g-2 addresses securities deemed to be registered pursuant to Section 12(g)(1) upon termination of certain exemptions.

<sup>34</sup> Rule 12g-3 addresses the threshold for the registration of securities of successor issuers under Section 12(b) or Section 12(g).

apply the new statutory thresholds for banks and bank holding companies to savings and loan holding companies.<sup>35</sup>

Because the new statutory threshold for banks, savings and loan holding companies and bank holding companies is not reflected in our existing rules, such institutions seeking to rely on the new 1,200 holder of record threshold to terminate registration and suspend reporting are not able to rely on the existing procedural accommodations in our rules to do so immediately. Without the proposed amendments, a bank, savings and loan holding company or bank holding company is required to wait 90 days after filing a certification with the Commission that the number of its holders of record is less than 1,200 persons to terminate its Section 12(g) registration and cease filing reports required by Exchange Act Section 13(a),<sup>36</sup> rather than being able to suspend its Section 13(a) reporting obligations immediately upon the filing of a Form 15<sup>37</sup> in reliance on the rule. Similarly, without the proposed amendments, banks, savings and loan holding companies or bank holding companies may not rely on Rule 12h-3 to immediately suspend their Section 15(d) reporting obligations using the new higher statutory threshold during a fiscal year. Rather, Section 15(d)(1) provides for suspending a Section 15(d) obligation only at the beginning of a fiscal year.

## **2. Comments on Proposed Rule Amendments**

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<sup>35</sup> Because of the FAST Act amendment to the Exchange Act, the Commission no longer needs to adopt changes relating to those thresholds using its general exemptive authority.

<sup>36</sup> 15 U.S.C. 78m(a).

<sup>37</sup> 17 CFR 249.323.



We received comments on the proposed amendments from two commenters.<sup>38</sup> These commenters supported the amendments as proposed. One commenter further agreed with our determination not to propose amendments to our rules relating to Exchange Act registration that extend substantially beyond the changes contemplated by the JOBS Act.<sup>39</sup> Several commenters also expressed support for our proposal to treat savings and loan holding companies similar to banks and bank holding companies for purposes of Exchange Act registration.<sup>40</sup>

### 3. Final Rule Amendments

After considering the comments, we are adopting the proposed amendments to Exchange Act Rules 12g-1, 12g-2, 12g-3, 12g-4 and 12h-3 to reflect the statutory changes made by the JOBS Act and the FAST Act. As amended, Rule 12g-1 provides that an issuer is not required to register a class of equity securities pursuant to Section 12(g)(1) if on the last day of its most recent fiscal year:

- the issuer had total assets not exceeding \$10 million; or
- the class of equity securities was held of record by fewer than 2,000 persons or 500 persons who are not accredited investors (as such term is defined in Securities Act Rule 501(a)),<sup>41</sup> determined as of such day rather than at the time of the sale of the securities; or

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<sup>38</sup> See letters from American Bankers Association (Feb. 27, 2015) (“American Bankers”) and American Bar Association (Apr. 10, 2015) (“ABA”).

<sup>39</sup> See letter from ABA.

<sup>40</sup> See letters from American Bankers, ABA and Independent Community Bankers Association (Feb. 27, 2015) (“ICBA”).

<sup>41</sup> 17 CFR 230.501(a).

- in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act; or a bank holding company, as such term is defined in Section 2 of the Bank Holding Company Act of 1956, the class of equity securities was held of record by fewer than 2,000 persons.<sup>42</sup>

As revised, Rule 12g-2, which addresses securities deemed to be registered pursuant to Section 12(g)(1) upon termination of the exemption pursuant to Section 12(g)(2)(A) or (B)<sup>43</sup> and establishes a 300-person threshold for such a class of securities to be registered under Section 12(g), provides a 1,200-person registration threshold for a bank, a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act, or bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956.

Revised Rule 12g-3, which addresses the 300-person threshold for the registration of securities of successor issuers under Section 12(b) or Section 12(g), similarly provides a 1,200-person registration threshold for a bank, a savings and loan holding company, as such term is defined in Section 10 of the Home Owners' Loan Act, or bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956.

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<sup>42</sup> As observed by one commenter, Section 501 of the JOBS Act amended Section 12(g)(1) of the Exchange Act to require an issuer to register a class of equity securities (other than exempted securities) if, on the last day of its fiscal year, the issuer has total assets of more than \$10 million and the class of equity securities is "held of record by either 2,000 persons, or 500 persons who are not accredited investors." See letter from Keith P. Bishop (Mar. 1, 2016). We read this language to provide that an issuer is not required to register under Section 12(g) if the issuer has fewer than 2,000 persons, or 500 persons who are not accredited investors that hold of record. An issuer with more than 2,000 persons, or 500 persons who are not accredited investors, that hold of record has necessarily met the threshold and would be required to register pursuant to Section 12(g)(1)(A).

<sup>43</sup> Section 12(g)(2)(A) [15 U.S.C. 78j(g)(2)(A)] provides an exemption from Section 12(g) registration while the class of securities is listed and registered on a national securities exchange under Exchange Act Section 12(b) [15 U.S.C. 78j(b)]. Section 12(g)(2)(B) [15 U.S.C. 78j(g)(2)(B)] provides an exemption for securities issued by registered investment companies.

Revised Rule 12g-4(a) provides that termination of registration under Section 12(g) shall take effect in 90 days, or such shorter period as the Commission determines, after the issuer certifies on Form 15 that the class of securities is held of record by fewer than 300 persons, 1,200 persons in the case of a bank, a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act, or a bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956, or 500 persons where the total assets of the issuer have not exceeded \$10 million on the last day of each of the preceding three years. As a result of the changes to Rule 12g-4(a), banks, savings and loan holding companies and bank holding companies will be able to terminate registration of a class of securities and suspend immediately their duty to file current and periodic reports upon filing a certification on Form 15 at the 1,200 person threshold.

Finally, revised Rule 12h-3 provides that the duty to file current and periodic reports under Section 13(a) pursuant to Section 15(d) for that class of securities is suspended immediately upon the filing of a certification on Form 15, provided that the issuer has fewer than 300 holders of record, 500 holders of record where the issuer's total assets have not exceeded \$10 million on the last day of each of the preceding three years, or in the case of a bank, a savings and loan holding company, as such term is defined in Section 10 of the Home Owners' Loan Act, or bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956, 1,200 holders of record; the issuer has filed its Section 13(a) reports for the most recent three completed fiscal years, and for the portion of the year immediately preceding the date of filing the Form 15 or the period since the issuer became subject to the reporting obligation; and a registration statement

has not become effective or was required to be updated pursuant to Exchange Act Section 10(a)(3)<sup>44</sup> during the fiscal year.<sup>45</sup>

## **B. Application of the Increased Threshold for Accredited Investors**

Section 501 of the JOBS Act amended Exchange Act Section 12(g)(1) to increase the threshold that triggers registration by an issuer other than a bank or bank holding company to total assets exceeding \$10 million and a class of equity securities (other than an exempted security) held of record by either 2,000 persons or 500 persons who are not accredited investors (as such term is defined by the Commission).<sup>46</sup> To rely on the new, higher threshold established by the JOBS Act, an issuer will need to be able to determine which of its record holders are accredited investors. A number of pre-proposal commenters pointed to potential compliance concerns with respect to identifying accredited investors and recommended ways to facilitate issuers' use of the increased threshold for holders of record that are accredited investors.<sup>47</sup>

### **1. Proposed Rule Amendment**

We proposed to amend Rule 12g-1 to make clear that the definition of “accredited investor” in Securities Act Rule 501(a) applies in making determinations under Exchange Act Section 12(g)(1) and that the “accredited investor” determination must be made as of

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<sup>44</sup> 15 U.S.C. 78j(a)(3).

<sup>45</sup> The automatic statutory suspension of an issuer's Section 15(d) reporting obligation also is not available as to any fiscal year in which the issuer's Securities Act registration statement becomes effective or is required to be updated pursuant to Section 10(a)(3) of the Securities Act.

<sup>46</sup> The statutory amendment was effective upon enactment of the JOBS Act and does not require any Commission action. While this change primarily affects issuers that have never had a reporting obligation under the Exchange Act, issuers that have terminated registration will need to monitor the accredited investor status of their holders of record as of the last day of each fiscal year.

<sup>47</sup> See, e.g., letters from New York City Bar Association (June 6, 2012) (“NYCBA”), the Business Law Section of the American Bar Association (June 26, 2013) (“ABA Pre-Proposal”) and Foley & Lardner (May 24, 2012) (“Foley”).

the last day of the fiscal year rather than at the time of the sale of the securities.<sup>48</sup> In proposing to use the Rule 501(a) definition, we stated our belief that applying the familiar concepts of the accredited investor definition in Rule 501(a) to the registration threshold in Section 12(g)(1) would facilitate compliance for issuers.<sup>49</sup> We also noted our concern that reliance on information previously provided by security holders in connection with the purchase or transfer of securities for an indefinite period into the future could result in the use of outdated information that may no longer be reliable.<sup>50</sup>

## 2. Comments on Proposed Rule Amendment

We received comments on the proposed approach from five commenters.<sup>51</sup> Four commenters supported the use of the Securities Act Rule 501(a) definition.<sup>52</sup> Two of these commenters requested that the Commission provide guidance on how to establish a reasonable belief of accredited investor status.<sup>53</sup> A number of commenters supported establishing a safe harbor for the accredited investor determination that permits an issuer to rely on previously obtained information relating to accredited investor status.<sup>54</sup> These

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<sup>48</sup> Securities Act Rule 501(a) otherwise defines “accredited investor” as being determined at the time of the sale of the securities.

<sup>49</sup> See Proposing Release at Section II.C.

<sup>50</sup> Id.

<sup>51</sup> See letters from ABA, Alternative & Direct Investment Securities Association (Mar. 2, 2015) (“ADISA”), Investment Program Association (Mar. 2, 2015) (“IPA”), Securities Arbitration Clinic, Cardozo Law School (Mar. 2, 2015) (“Cardozo”) and Managed Funds Association (Mar. 2, 2015) (“MFA”).

<sup>52</sup> See letters from ABA, ADISA, Cardozo and MFA.

<sup>53</sup> See letters from ABA and ADISA. ABA recommended that the Commission provide guidance by rule or in the text of the release.

<sup>54</sup> See letters from ADISA, Milken Institute Center for Financial Markets (Mar. 2, 2015) (“CFM”), Cleary, Gottlieb, Steen & Hamilton LLP (Feb. 27, 2015) (“Cleary”) and IPA. CFM suggested that a safe harbor would create certainty and predictability for issuers and investors. IPA recommended a safe harbor as an alternative to determination at time of the last sale and proposed that securities sold prior to the effective date of any rule should not be subject to reaffirmation of accredited investor status.

commenters recommended various safe harbors that permit issuers to rely on: information obtained at the time securities were initially or most recently sold to that person;<sup>55</sup> an annual self-certification or affirmation;<sup>56</sup> and determinations made by certain third parties.<sup>57</sup> Another commenter provided a more limited recommendation that the Commission permit reliance on accredited investor status determinations made in offerings during the three months prior to fiscal year-end or on self-certification by investors if the offering occurred more than three months but less than twelve months prior to fiscal year-end.<sup>58</sup>

One commenter opposed a formal safe harbor out of concern it would become a de facto minimum standard and recommended instead that the Commission provide additional guidance.<sup>59</sup> Specifically, this commenter recommended that:

- an issuer should be able to rely on information previously provided by investors as indicative of their current accredited investor status, when there is a reasonable basis for doing so;
- an annual confirmation should only be necessary if there was reason to believe that an investor's status had changed;
- an issuer should be able to rely on certification from certain third parties; and

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<sup>55</sup> See letters from ADISA and CFM.

<sup>56</sup> See letters from ADISA and IPA. CFM further recommended allowing an issuer to assume that an investor's status has not changed and to query investors "as needed" via a written communication.

<sup>57</sup> See letters from ADISA, Cleary and IPA. These commenters recommended permitting reliance on information from registered broker-dealers, registered investment advisers, licensed attorneys, or certified public accountants.

<sup>58</sup> See letter from Cleary.

<sup>59</sup> See letter from ABA.

- an issuer should not be subject to enforcement if the basis was reasonable at the time the conclusion was reached.<sup>60</sup>

One commenter recommended that the Commission issue a separate rule or safe harbor with respect to private investment funds.<sup>61</sup> The commenter noted that private investment funds that rely on the exemption in Investment Company Act Section 3(c)(7)<sup>62</sup> (“3(c)(7) Funds”) may have an unlimited number of investors that are “qualified purchasers,” a significantly higher standard than “accredited investors.” The commenter recommended a rule that permits 3(c)(7) Funds to continue to rely on their initial determination of a record holder’s qualified purchaser and accredited investor status on a going forward basis without requiring additional annual diligence. In the alternative, the commenter recommended that the Commission provide a non-exclusive safe harbor that permits 3(c)(7) Funds to send an annual negative consent letter to record holders asking them to inform the issuer if their accredited investor status has changed and permits treatment of a non-response as confirmation of status.

Two commenters expressed concern about the timing of the determination and opposed requiring determination as of the last day of the fiscal year.<sup>63</sup> One of these

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<sup>60</sup> See letter from ABA. See also letter from IPA advocating against annual recertification, which noted that any future adjustments to the definition of accredited investor could affect an issuer’s number of accredited investors. This could cause issuers to be required to register despite an issuer’s efforts to sell only to an appropriately limited number of accredited and non-accredited investors at the time of the offer and sale. ABA recommended a presumption that a person continues to be an accredited investor under the revised definition to address concerns relating to future adjustments to the definition of accredited investor.

<sup>61</sup> See letter from MFA.

<sup>62</sup> 15 U.S.C. 80a-3(c)(7).

<sup>63</sup> See letters from ADISA and IPA. ADISA recommended permitting issuers to rely on information available at the time they made a judgment, rather than requiring issuers to update information as of the end of the fiscal year. IPA recommended that accredited investor status be determined at the time of last sale, not annually, and expressed concern regarding the administrative and reporting costs of determinations required as of the last day of the fiscal year.

commenters claimed that annual reconfirmation will be costly, will provide little investor protection and may cause issuers to sell to fewer investors.<sup>64</sup> This commenter recommended only requiring yearly recertification if there is a ready market for the securities and the securities are freely tradable.<sup>65</sup>

### 3. Final Rule Amendment

After considering the comments, we are adopting an amendment to Rule 12g-1 as proposed, providing that the term “accredited investor” for purposes of Section 12(g)(1) is as defined in Securities Act Rule 501(a).<sup>66</sup> Consistent with the proposal, the “accredited investor” determination for these purposes must be made as of the last day of the issuer’s most recent fiscal year rather than at the time of the sale of the securities. Commenters supported use of the Securities Act Rule 501(a) definition.<sup>67</sup> Rule 501(a) provides that an accredited investor is any person who comes within one or more of the categories of investors specified therein, or whom the issuer reasonably believes comes within any such category. Whether the issuer has a reasonable belief depends on the particular facts and circumstances surrounding the determination. Under amended Rule 12g-1, an issuer will need to determine, based on facts and circumstances, whether prior

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<sup>64</sup> See letter from IPA. IPA cited an estimate of ongoing reporting costs under the Exchange Act of \$650,000 annually. This commenter additionally noted that becoming an Exchange Act reporting company may be contrary to an issuer’s business plan and against investors’ economic interests.

<sup>65</sup> See letter from IPA. IPA suggested that most affected investors will not hold freely tradable securities, muting the benefits of public company reporting for those investors.

<sup>66</sup> Consideration of the use of the “accredited investor” definition in this context is distinct from other efforts to consider the definition. In December 2015, the staff issued a report addressing the “accredited investor” definition and providing certain recommendations for our consideration. See Report on the Review of the Definition of Accredited Investor (Dec. 18, 2015), available at <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

<sup>67</sup> See letters from ABA, ADISA, Cardozo and MFA.



information provides a basis for a reasonable belief that the security holder continues to be an accredited investor as of the last day of the fiscal year.<sup>68</sup>

Although some commenters requested that the Commission provide guidance on making the accredited investor determination in the Section 12(g) context or establish a safe harbor relating to the determination,<sup>69</sup> we have decided against doing so. Our rules do not currently provide a safe harbor for the reasonable belief determination made under Rule 501(a) for exempt offerings and we do not believe that the determinations required for Section 12(g) present a more compelling case for having such a safe harbor. Additionally, as one commenter noted, a safe harbor could become a de facto minimum standard.<sup>70</sup> We believe that requiring issuers to consider their particular facts and circumstances in establishing a reasonable basis for their determination provides issuers with appropriate flexibility for making the determination.<sup>71</sup>

As adopted, the accredited investor determination under Rule 12g-1 must be made as of the last day of the issuer's most recent fiscal year rather than at the time of the sale of the securities. Several commenters recommended that the Commission adopt rules providing that the determination need not be made at year-end.<sup>72</sup> We believe that a fiscal

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<sup>68</sup> If after the issuer has made its determination as of the end of the fiscal year, it is subsequently determined that an investor did not, in fact, come within one of the accredited investor categories, the issuer may rely on that determination for that fiscal year if it had a reasonable belief at the time the determination was made.

<sup>69</sup> See letters from ABA, ADISA, CFM, Cleary and MFA.

<sup>70</sup> See letter from ABA.

<sup>71</sup> One commenter requested that the Commission establish a separate safe harbor or rule with respect to private investment funds. See letter from MFA. We are declining to provide specific relief to private investment funds for reasons similar to those discussed for issuers generally. We believe that a standard where issuers, including private investment funds, consider their particular facts and circumstances in establishing a reasonable basis for believing that a security holder is an accredited investor is the most appropriate standard to apply at this time.

<sup>72</sup> See letters from ADISA and IPA.

year-end determination date is appropriate because the Section 12(g)(1) requirement to register is triggered if the issuer meets the specified asset and held of record thresholds at the end of its fiscal year.

Other commenters recommended permitting an issuer to rely on previously obtained information relating to accredited investor status.<sup>73</sup> We continue to be concerned that permitting issuers to rely solely on previously obtained information, which in some cases could be years or decades old, could result in the use of outdated and unreliable information when making the determination. One commenter suggested that we permit issuers to rely on accredited investor determinations made in offerings during the three months prior to fiscal year-end or on self-certification by investors if the offering occurred more than three months but less than twelve months prior to fiscal year-end.<sup>74</sup> While such information could provide a reasonable basis for making a determination about accredited investor status as of the end of the fiscal year, for the reasons set forth above, we believe that issuers should consider their particular facts and circumstances before reaching such a conclusion and that the “reasonable belief” standard under Rule 501(a) provides issuers with a familiar context and appropriate flexibility in making such a determination.

### **III. AMENDMENTS TO EXCHANGE ACT RULE 12g5-1**

#### **A. Statutory Requirement and Definition of “Employee Compensation Plan”**

Exchange Act Section 12(g)(5), as amended by Section 502 of the JOBS Act, provides that the definition of “held of record” shall not include securities held by

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<sup>73</sup> See letters from ABA, CFM, Cleary and MFA.

<sup>74</sup> See letter from Cleary.

persons who received them pursuant to an “employee compensation plan” in transactions exempted from the registration requirements of Section 5 of the Securities Act. By its express terms, this new statutory exclusion applies solely for purposes of determining whether an issuer is required to register a class of equity securities under the Exchange Act and does not apply to a determination of whether such registration may be terminated or suspended.<sup>75</sup> The provision, which is substantially broader than the Commission’s existing rules exempting compensatory employee stock options from Section 12(g) registration,<sup>76</sup> does not define the term “employee compensation plan.”

Section 503 of the JOBS Act instructs the Commission to amend the definition of “held of record” to implement the amendment in Section 502 and to adopt a safe harbor that issuers can use when determining whether holders of their securities received them pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act.

### **1. Proposed Rule Amendment**

We did not propose to define the term “employee compensation plan.” Instead, we proposed to revise the definition of “held of record” and to additionally establish a non-exclusive safe harbor that relies on the current definition of “compensatory benefit plan” in Rule 701 and the conditions in Rule 701(c).

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<sup>75</sup> The statutory exclusion in Section 12(g)(5) specifically refers to Exchange Act Section 12(g)(1), which relates to when an issuer must register its securities with the Commission.

<sup>76</sup> Exchange Act Rule 12h-1(f) [17 CFR 240.12h-1(f)] provides non-reporting issuers with an exemption from Section 12(g) registration for stock options issued under written compensatory stock option plans under certain conditions. Exchange Act Rule 12h-1(g) [17 CFR 240.12h-1(g)] provides reporting issuers a similar exemption for such stock options. The exemptions provide specific eligibility requirements and are limited to options issued pursuant to a written compensatory stock option plan. See Exemption of Compensatory Stock Options from Registration Under Section 12(g) of the Securities Exchange Act of 1934, Release No. 34-56887 (Dec. 3, 2007) [72 FR 69554 (Dec. 7, 2007)].

## 2. Comments on Proposed Rule Amendment

We received comments from two commenters generally supportive of the proposed amendment.<sup>77</sup> One of those commenters specifically supported our determination not to create a new definition of the term “employee compensation plan.”<sup>78</sup> This commenter suggested that application in a Section 12(g) context of the familiar concepts applied by an issuer in connection with its exempt issuances of compensatory equity securities under Securities Act Rule 701 would facilitate compliance by streamlining the issuer’s learning curve and simplifying recordkeeping.

## 3. Final Rule Amendment

After considering the comments, we are adopting an amendment to Rule 12g5-1 to revise the definition of “held of record,” and establish a non-exclusive safe harbor. By not defining the term “employee compensation plan,” and providing for a non-exclusive safe harbor, we believe issuers will have appropriate flexibility to make a principles-based determination about securities received as employee compensation when determining their holders of record under Section 12(g)(5), as well as the added certainty of a safe harbor. We further believe that developing a new definition for “employee compensation plan” could result in needless complexity and create potential conflicts with the current definitions of “compensatory benefit plan” and “employee benefit plan.”<sup>79</sup> Finally, we note that by conditioning the new exclusion from “held of record” upon the securities being received pursuant to an employee compensation plan in

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<sup>77</sup> See letters from ABA and ADISA.

<sup>78</sup> See letter from ABA.

<sup>79</sup> See Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)] (the “1999 Rule 701 Release”), and Registration of Securities on Form S-8, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] (the “1999 Form S-8 Release”).

transactions exempted from the registration requirements of Section 5 of the Securities Act, Section 502 of the JOBS Act uses Securities Act concepts to identify persons that an issuer may exclude from its determination of the number of holders of record under Section 12(g)(1) of the Exchange Act. Because this provision of the JOBS Act includes concepts from both the Securities Act and Exchange Act,<sup>80</sup> we believe that it will facilitate compliance if the terminology used in the new safe harbor in Exchange Act Rule 12g5-1(a)(8)(ii) is consistent with the terminology used in our Securities Act rules.

**B. Definition of “Held of Record”**

Section 503 of the JOBS Act directed the Commission to revise the definition of “held of record” pursuant to Section 12(g)(5) to provide that 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 may be excluded when calculating the number of holders of record of a class of equity securities for purposes of determining the issuer’s registration obligation under Section 12(g)(1). We received pre-proposal comments addressing issues about the scope of the definition. One commenter recommended that securities issued in a subsequent transaction (including a business combination) that is exempt from, or otherwise is not subject to, the registration requirements of Section 5 to eligible employees, former employees and other covered persons in exchange for securities covered by the Section 12(g)(5) compensatory plan securities carve-out also should be excluded.<sup>81</sup> The same commenter further

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<sup>80</sup> This provision of the JOBS Act relies on concepts from both the Securities Act and the Exchange Act by establishing that certain securities received pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act may be excluded when determining whether an issuer is required to register under Section 12(g) of the Exchange Act.

<sup>81</sup> See letter from ABA Pre-Proposal.

recommended that securities issued in unregistered transactions based on the “no sale” theory<sup>82</sup> should be included within the definition of “transactions exempt from Section 5.”

### 1. Proposed Rule Amendment

We proposed to amend the definition of “held of record” to provide that when determining whether an issuer is required to register a class of equity securities with the Commission pursuant to Exchange Act Section 12(g)(1) an issuer may exclude securities that are either:

- held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from the registration requirements of Section 5 of the Securities Act;
- held by persons who received the securities pursuant to an employee compensation plan in transactions that did not involve a sale within the meaning of Section 2(a)(3) of the Securities Act; or
- held by persons eligible to receive securities from the issuer pursuant to Securities Act Rule 701(c) who received the securities in a transaction exempt from the registration requirements of Section 5 of the Securities Act in exchange for securities excludable under proposed Rule 12g5-1(a)(7).

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<sup>82</sup> The “no sale” theory relates to the issuance of compensatory grants made by employers to broad groups of employees pursuant to broad-based stock bonus plans without Securities Act registration under the theory that the awards are not an offer or sale of securities under Section 2(a)(3) of the Securities Act [15 U.S.C. 77b(a)(3)]. See Employee Benefit Plans; Interpretations of Statute, Release No. 33-6188 (Feb. 1, 1980) [45 FR 8960 (Feb. 11, 1980)] at Section II.A.5.d; Employee Benefit Plans, Release No. 33-6281 (Jan. 15, 1981) [46 FR 8446 (Jan. 27, 1981)] at Section III. Many issuers rely on the “no sale” theory when making such awards to employees where no consideration – and hence no “value” – is received by the issuer in return. The staff has not objected to these issuances in a series of no-action letters. See, e.g., no-action letter to Verint Systems Inc. (May 24, 2007).

Section 502 of the JOBS Act refers specifically to “transactions exempted” from the Securities Act Section 5 registration requirements. A number of issuers, however, issue securities to employees without Securities Act registration on the basis that the issuance is not a sale under Section 2(a)(3) of the Securities Act and therefore does not trigger the registration requirement of Securities Act Section 5, which applies only to the offer and sale of securities.<sup>83</sup> While securities issued to employees in transactions that do not involve a sale under Section 2(a)(3) are not technically “transactions exempted from the registration requirements of section 5,” they are similar to other compensatory issuances to employees in exempt transactions in that the issuer provides the awards to employees for a compensatory purpose. We therefore proposed to exclude such “no sale” issuances from the definition of “held of record” in Rule 12g5-1 for purposes of determining an issuer’s obligation to register a class of securities under the Exchange Act.

Additionally, we proposed to permit an issuer to exclude securities of holders who are persons eligible to receive securities from the issuer pursuant to Rule 701(c) and who acquired the securities in exchange for securities excludable under the proposed definition. The proposed exclusion was intended to facilitate the ability of an issuer to conduct restructurings, business combinations and similar transactions that are exempt from Securities Act registration so that if the securities being surrendered in such a transaction would not have been counted under the proposed definition of “held of record,” the securities issued in the exchange also would not be counted under this

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<sup>83</sup> See id.

definition.<sup>84</sup> The securities issued in the exchange would be deemed to have a compensatory purpose because they would replace other securities previously issued pursuant to an employee compensation plan. We believed such an approach would be consistent with the intent of Section 502 of the JOBS Act and would provide issuers with appropriate flexibility to conduct certain business combinations and similar transactions.

## **2. Comments on Proposed Rule Amendment**

We received comments on the proposed amendment from two commenters, both generally supporting the amendment.<sup>85</sup> One commenter supported the proposed amendment to the definition of “held of record” to implement JOBS Act Section 503, but recommended that the Commission clarify and extend the scope of the proposed exclusion for securities received in exchange for excludable securities.<sup>86</sup> The commenter recommended that the Commission revise the exclusion for employee compensation plan securities acquired through a business combination to encompass securities that are “exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act.” The commenter noted that the proposed language, if construed literally, may not apply to exempt securities under Section 3 of the Securities Act, such as securities issued under Section 3(a)(9) (in connection with exchange offers), Regulation A or Rule 504 or 505 of Regulation D, because those exemptions are securities-based rather than transaction-based. Finally, the commenter noted that business combinations do not always involve an exchange and suggested additional clarification that the rule

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<sup>84</sup> As proposed and consistent with Rule 701(c), securities held of record by former employees would be excluded when determining the securities held of record only if the employees were employed by or providing services to the surviving issuer at the time the exchange securities were offered.

<sup>85</sup> See letters from ABA and ADISA.

<sup>86</sup> See letter from ABA.



would apply to securities received “in exchange for, in substitution for or upon conversion or exercise of” the original securities.

This commenter additionally recommended that the Commission expand the exclusion for securities issued in business combinations and similar transactions that replace securities previously issued pursuant to an employee compensation plan to include former employees, directors, general partners, trustees, officers, or consultants and advisors who were employed by, or providing services to, a predecessor of the issuer or a company acquired in a business combination. The commenter expressed concern that denying the exclusion to former employees could inhibit issuers from entering into business combination transactions.

### **3. Final Rule Amendment**

After considering the comments, we are adopting Exchange Act Rule 12g5-1(a)(8)(i) with the clarifications and changes detailed below.<sup>87</sup> We are amending the definition of “held of record” to provide that when determining whether an issuer is required to register a class of equity securities with the Commission pursuant to Exchange Act Section 12(g)(1) an issuer may exclude securities that are:

- held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act; or

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<sup>87</sup> As part of the amendments to Regulation A, we adopted a new Exchange Act Rule 12g5-1(a)(7) providing a conditional exemption to the definition of “held of record” for securities issued in Tier 2 Regulation A offerings. Amendments to Regulation A, Rel. No. 33-9741 (Mar. 25, 2015) [80 FR 21805 (Apr. 20, 2015)]. We proposed to use Rule 12g5-1(a)(7) for the exemption and safe harbor under the definition of “held of record” for certain employee compensation plan securities in the Proposing Release. Because Rule 12g5-1(a)(7) has been adopted in relation to Regulation A, we are adopting the proposed exemption and safe harbor as Exchange Act Rule 12g5-1(a)(8).

- held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act from this issuer, a predecessor of the issuer or an acquired company in substitution or exchange for excludable securities under Exchange Act Rule 12g5-1(a)(8)(i)(A), as long as the persons were eligible to receive securities pursuant to Rule 701(c) at the time the excludable securities were originally issued to them.

Consistent with one commenter’s suggestion,<sup>88</sup> we are revising the language in new Exchange Act Rule 12g5-1(a)(8)(i)(A) to encompass securities received in transactions exempt from, or not subject to, the registration requirements of Section 5. Such transactions include transactions that did not involve a sale of securities within the meaning of Section 2(a)(3) of the Securities Act, as well as transactions involving exempt securities, such as sales of securities made pursuant to Section 3 of the Securities Act. As we indicated in the Proposing Release, while securities issued to employees in transactions that do not involve a sale under Section 2(a)(3) are not technically “transactions exempted from the registration requirements of Section 5,” they are similar to other compensatory issuances to employees in exempt transactions in that the issuer provides the awards to employees for a compensatory purpose. We believe it is consistent with the statutory relief to also exclude from the definition of “held of record” in Rule 12g5-1 exempt securities issued to employees pursuant to an employee compensation plan. These exempt securities are similarly issued to employees for compensatory purposes and their issuance does not require registration under the Securities Act.

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<sup>88</sup> See letter from ABA.

We are adopting new Exchange Act Rule 12g5-1(a)(8)(i)(B) to provide relief in the context of business combinations. We are clarifying and expanding the proposed relief to encompass securities held by former employees of the issuer or its predecessors. In response to a commenter’s concern that the term “in exchange for” is not broad enough to capture all of the ways in which a person may receive new securities in place of existing securities held prior to a business combination, we have revised the language by using the phrase “in substitution or exchange for” to cover various methods of how those securities may be received in place of the existing securities, such as upon conversion or exercise of such securities. In response to a commenter’s concerns,<sup>89</sup> we are revising proposed Rule 12g5-1(a)(8)(i)(B) to also permit securities to be excluded if they were received by former employees in an exempt transaction in substitution or exchange for excludable securities, where the former employees were eligible under Rule 701(c) to receive the original securities at the time of issuance. Under the exemption as proposed, securities received in such an exchange by former employees of an issuer and employees of an acquired issuer or the target company in a business combination would not have been excludable. Requiring issuers to count those securities for Exchange Act registration purposes could, as the commenter noted, inhibit issuers from entering into economically beneficial business combinations. Such former employees of the issuer, and employees of a predecessor of the issuer or an acquired company, will have received the original securities pursuant to an employee compensation plan in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act. We therefore believe it is appropriate to exclude the securities received by these former

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<sup>89</sup> Id.

employees<sup>90</sup> in such an exchange when determining whether an issuer is required to register under Section 12(g)(1).

### **C. Non-exclusive Safe Harbor for Determining Holders of Record**

Section 503 of the JOBS Act directed the Commission to establish a safe harbor in Rule 12g5-1 that issuers can rely on when determining if 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 may be excluded when calculating the number of holders of record of a class of equity securities for purposes of determining the issuer's registration obligation under Section 12(g)(1). One pre-proposal commenter recommended that the Commission expressly provide a non-exclusive safe harbor akin to the Securities Act Rule 506 safe harbor under Securities Act Section 4(a)(2).<sup>91</sup> This commenter recommended that the safe harbor provide that an issuer may treat an issuance of securities as exempt from Securities Act registration for purposes of Section 12(g)(5) if that issuer had a reasonable belief that the exemption was available at the time the securities were issued.<sup>92</sup>

#### **1. Proposed Rule Amendment**

We proposed a non-exclusive safe harbor that would provide that a person will be deemed to have received the securities pursuant to an employee compensation plan if

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<sup>90</sup> Rule 701(c) provides appropriate limitations on who may qualify as an employee, former employee, or permitted family member transferee. See discussion in Section III.C.3.a.

<sup>91</sup> See letter from ABA Pre-Proposal recommending that the Commission provide “that the safe harbor(s) is not the exclusive means by which an issuer may comply with the ‘compensatory plan carve-out’ provisions of Section 12(g)(5).” This commenter suggested that “failure to satisfy all conditions to reliance on the safe harbor(s) should not preclude reliance on the statutory carve-out itself.”

<sup>92</sup> See letter from ABA Pre-Proposal.

such person received them pursuant to a compensatory benefit plan in transactions that met the conditions of Securities Act Rule 701(c).

## **2. Comments on Proposed Rule Amendment**

We received comments on the proposed amendment from two commenters, both generally supporting the amendment.<sup>93</sup> One commenter, while generally supportive of the rule and safe harbor, expressed concern that an issuer's ability to rely on the safe harbor was conditioned on the issuer's ability to demonstrate compliance with all of the express requirements of an exemption, placing undue emphasis on technical aspects of the exemption that should not serve as the basis for determining whether an issuer should be required to register under Section 12(g).<sup>94</sup> This commenter suggested that Section 503 of the JOBS Act should be read to mandate that the safe harbor provide certainty with respect to the exempt offering condition of JOBS Act Section 502 and that if the safe harbor requires an issuer to establish annually that each issuance of exempt equity securities satisfied an available Securities Act exemption, then the safe harbor would impose a significant ongoing burden on the issuer. The commenter recommended revising the safe harbor so that, solely for purposes of Exchange Act Section 12(g), the original issuance would be deemed to have satisfied the Securities Act exemption condition if the conditions of Securities Act Rule 701(c) are satisfied at the end of the fiscal year.<sup>95</sup>

Two commenters made recommendations that the Commission provide more guidance on the application of Securities Act Rule 701(c), or modify the application of

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<sup>93</sup> See letters from ABA and ADISA.

<sup>94</sup> See letter from ABA.

<sup>95</sup> Id.

Rule 701(c) in the Section 12(g) context.<sup>96</sup> One commenter recommended that there be no limit on the categories of persons who may receive securities pursuant to an employee compensation plan for purposes of the safe harbor.<sup>97</sup> Another commenter recommended expanding the provisions of Securities Act Rule 701(c) to exempt any consultants and advisors, instead of maintaining the limitation in Rule 701(c) to consultants and advisors who are natural persons.<sup>98</sup> This commenter also recommended that the Commission explicitly provide that Rule 701(c) extends to family members who acquire equity securities initially issued pursuant to a compensatory benefit plan from an employee (or former employee) by gift or domestic relations order, or upon an employee's death or disability, as well as to the executor or guardian of the employee, former employee, or family member who acquires the securities upon such person's death or disability.

### **3. Final Rule Amendment and Interpretation**

After considering the comments, we are adopting the proposed amendment to Exchange Act Rule 12g5-1(a)(8) with the additions and clarifications detailed below. We are adopting a non-exclusive safe harbor.<sup>99</sup> The safe harbor provides that:

- an issuer may deem a person to have received the securities pursuant to an employee compensation plan if such 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

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<sup>96</sup> See letters from ABA and ADISA.

<sup>97</sup> See letter from ADISA.

<sup>98</sup> See letter from ABA.

<sup>99</sup> Failure to satisfy all of the conditions of the non-exclusive safe harbor would not preclude reliance on Section 12(g)(5) or other provisions of the rule.

- an issuer may, solely for the 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.

**a. Employee Compensation Plan**

We believe that using the conditions of Rule 701(c) to structure the employee compensation plan safe harbor for the determination that a person received the securities pursuant to an employee compensation plan allows issuers to apply well understood principles of an existing Securities Act exemption to the new Exchange Act registration determination created by the JOBS Act. We believe application in a Section 12(g) context of the familiar concepts applied in connection with the issuance of compensatory equity securities under Securities Act Rule 701 will facilitate compliance and simplify recordkeeping.

Rule 701 exempts from Securities Act registration offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation. Rule 701(c) limits this exemption to offers and sales of securities under a written compensatory benefit plan established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees, officers, or consultants and advisors.<sup>100</sup> Rule 701(c)(1) sets forth special requirements for consultants and advisors<sup>101</sup> and Rule 701(c)(3) defines eligible family members.<sup>102</sup>

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<sup>100</sup> Securities Act Rule 701(c) exempts offers and sales of securities (including plan interests and guarantees pursuant to Rule 701(d)(2)(ii)) under a written compensatory benefit plan (or written

The safe harbor we are adopting today is available for the plan participants enumerated in Rule 701(c), including employees, directors, general partners, trustees, officers and certain consultants and advisors.<sup>103</sup> The safe harbor also is available for

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compensation contract) established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. This section exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered. In addition, the term "employee" includes insurance agents who are exclusive agents of the issuer, its subsidiaries or parents, or who derive more than 50% of their annual income from those entities. As explained in the 1999 Rule 701 Release at Section II.D, Rule 701 is also available to persons with a de facto employment relationship with the issuer. Such a relationship would exist where a person not employed by the issuer provides the issuer services that traditionally are performed by an employee and the compensation paid for those services is the primary source of the person's earned income.

<sup>101</sup> The Commission adopted amendments to Form S-8 and the Rule 405 definition of "employee benefit plan" that made Form S-8 available for the issuance of securities to consultants or advisors only if: they are natural persons; they provide bona fide services to the registrant; and the services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities. See 1999 Form S-8 Release and 1999 Rule 701 Release. Rule 701(c)(1) applies the same limitations regarding consultants and advisors as those provided in Form S-8 and the Rule 405 definition of "employee benefit plan."

<sup>102</sup> Rule 701 is available for the exercise of employee benefit plan options by an employee's family member who has acquired the options from the employee through a gift or a domestic relations order. As defined in Exchange Act Rule 701(c)(3) [17 CFR 230.701(c)(3)], for this purpose, "family member" includes any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, any person sharing the employee's household (other than a tenant or employee), a trust in which these persons have more than 50% of the beneficial interest, a foundation in which these persons (or the employee) control the management of assets, and any other entity in which these persons (or the employee) own more than 50% of the voting interests.

<sup>103</sup> Unlike traditional employees, consultants and advisors typically provide their services to multiple clients rather than to the same issuer on a dedicated basis. This distinction may cause them to be less likely to hold the securities they receive as compensation and more likely to sell them. As a result the Commission limited the consultants and advisors eligible to rely on the exemption. See 1999 Rule 701 Release at Section II.D. We believe that in light of the Rule 701 restrictions applicable to consultants and advisors, the compensatory nature of the transactions justifies treating consultants and advisors who are eligible to receive securities in compensatory transactions that satisfy the conditions of Rule 701(c) as persons who receive securities pursuant to an employee compensation plan for purposes of the Rule 12g5-1 safe harbor. Furthermore, since the securities would no longer be eligible for the exclusion under the safe harbor following their transfer, we believe the potential for abuse would be limited. However, in spite of one commenter's recommendation (see letter from ABA), we see no reason to expand the scope of eligible consultants and advisors under Section 12(g) or Rule 701, which the Commission narrowed in 1999 in order to address abuses in the use of Form S-8 and Rule 701. See



permitted family member transferees with respect to securities issued pursuant to a plan that are acquired by gift or domestic relations order from plan participants, or such securities acquired by permitted family member transferees in connection with options transferred to them by the plan participant through gifts or domestic relations orders.<sup>104</sup> Because the safe harbor is limited to holders who are persons specified in Rule 701(c), once these persons subsequently transfer the securities to holders not specified in Rule 701(c), whether or not for value, the securities must be counted as held of record by the transferee for purposes of determining whether the issuer is subject to the registration and reporting requirements of Exchange Act Section 12(g)(1).

An issuer may rely on the safe harbor when determining the holders of securities issued in reliance on Securities Act Rule 701, as well as holders of securities issued in transactions otherwise exempted from, or not subject to, the registration requirements of the Securities Act that satisfy the conditions of Rule 701(c), even if all the other conditions of Rule 701, such as issuer eligibility in Rule 701(b)(1), the volume limitations in Rule 701(d) or the disclosure delivery provisions in Rule 701(e), are not met. Thus, the safe harbor is available for holders of securities received in other employee compensation plan transactions exempted from, or not subject to, the registration requirements of Section 5 of the Securities Act, such as securities issued in

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Registration of Securities on Form S-8, Release No. 33-7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)]; Rule 701 – Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7645 (Feb 25, 1999) [64 FR 11095 (Mar. 8, 1999)].

<sup>104</sup> See Rule 701- Exempt Offerings Pursuant to Compensatory Arrangements, Release No. 33-7511 (Feb. 27, 1998) [63 FR 10785 (Mar. 5, 1998)] at Section III.E.4. Including family member transferees in the safe harbor is consistent with the approach in Rule 701(c), which provides an exemption to family member transferees in connection with stock options because of their common economic interest and the non-capital raising nature of the transactions.

reliance on Securities Act Section 4(a)(2), Regulation A, Regulation D, or Regulation S under the Securities Act, that also meet the conditions of Rule 701(c).

**b. Securities Issued in Exempt Transactions**

In response to comments, we are adding a provision to the safe harbor relating to the determination that the securities were issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act. The addition to the safe harbor provides that, solely for purposes of Section 12(g) of the Exchange Act, an issuer may deem securities to have been 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 issuance that the securities were issued in a transaction that was exempt from, or not subject to, the registration requirements of Section 5.

While one commenter recommended that the safe harbor should deem the securities qualified for the Securities Act exemption if the conditions of Securities Act Rule 701(c) were met as of the end of the fiscal year,<sup>105</sup> we believe that such a safe harbor would go too far and negate the requirement that the securities have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act at the time of issuance. Instead, the safe harbor provides issuers with relief from the burden of establishing that earlier issuances of securities satisfied an appropriate exemption on an annual basis provided it had a reasonable belief that it had complied with the appropriate registration requirements or the conditions of an applicable exemption at the time of issuance.

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<sup>105</sup> See letter from ABA.

**c. Interpretative Guidance Relating to Acquisitions by Family Members**

One commenter recommended that the Commission provide guidance regarding the application of Rule 701 to certain equity securities initially issued pursuant to a compensatory benefit plan acquired from an employee (or former employee) by gift or domestic relations order, or upon an employee's (or former employee's) death or disability.<sup>106</sup> In light of the nature of such transactions, family members (as defined in Rule 701(c)) who receive the equity securities as a result of the employee's (or former employee's) gift, domestic relations order, or death are also considered as persons who received "the securities pursuant to an employee compensation plan" for purposes of Rule 12g5-1(a)(8).<sup>107</sup>

**D. Foreign Private Issuers**

**1. Proposed Rule Amendments**

While "foreign private issuers"<sup>108</sup> would be able 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), we proposed to amend Exchange Act Rule 3b-4 to clarify that securities held by employees must continue to be counted for the purpose of determining the percentage of the issuer's outstanding securities held by U.S. residents,

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<sup>106</sup> See letter from ABA.

<sup>107</sup> In general we understand that guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the assets of former employees would administer the assets for the benefit of the former employee and title would not have transferred to these agents. In such circumstances, the securities would meet the conditions of Rule 701(c) for purposes of determining the holders of record.

<sup>108</sup> See Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)]. A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States.

and thus for determining whether an issuer qualifies as a foreign private issuer. We also proposed to amend the definition of “foreign private issuer” under Securities Act Rule 405 to reinsert an omitted instruction but with a proposed revision, identical to that proposed under Exchange Act Rule 3b-4, clarifying that securities held by employees must continue to be counted for the purposes of determining the percentage of the issuer’s outstanding securities held by U.S. residents and foreign private issuer status under the Securities Act.<sup>109</sup>

## **2. Comments on Proposed Rule Amendments**

We received comments on the proposed amendments from one commenter, who supported the proposed amendments relating to foreign private issuers.<sup>110</sup>

## **3. Final Rule Amendments**

After considering the comments, we are adopting the amendments substantially as proposed. Under the rules we are adopting, foreign private issuers may rely on Rule 12g5-1(a)(8) when making their determination of the number of U.S. resident holders under Exchange Act Rule 12g3-2(a).<sup>111</sup> Under Rule 12g3-2(a), foreign private issuers that meet the asset and shareholder threshold for registration under Section 12(g) are exempt from registering any class of securities under that section if the class of securities is held by fewer than 300 holders resident in the United States.<sup>112</sup> For purposes of determining whether this threshold is met, Rule 12g3-2(a)(1) specifies that the method shall be as provided in Exchange Act Rule 12g5-1, except that securities held of record

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<sup>109</sup> 17 CFR 230.405. The definition of “foreign private issuer” under the Securities Act is intended to be the same as the definition under Exchange Act Rule 3b-4.

<sup>110</sup> See letter from ABA.

<sup>111</sup> 17 CFR 240.12g3-2(a)

<sup>112</sup> Id.

by brokers, dealers, banks and nominees for the accounts of customers resident in the United States shall be counted as held by the number of separate accounts for which the securities are held.<sup>113</sup> Because the rule directs issuers to the definition of “held of record” in Rule 12g5-1, the statutory changes to Section 12(g)(5) as well as the amendment to Rule 12g5-1 adopted today also apply to the determination of a foreign private issuer’s U.S. resident holders for the purposes of the Rule 12g3-2(a) analysis.<sup>114</sup>

#### **IV. ECONOMIC ANALYSIS**

Title V and Title VI of the JOBS Act increased the registration thresholds for issuers, amended the definition of “held of record” to exclude securities issued pursuant to employee compensation plans and increased the thresholds for termination of registration and suspension of reporting under the Exchange Act for banks and bank holding companies. The FAST Act similarly increased the thresholds for registration, termination of registration and suspension of reporting under the Exchange Act for savings and loan holding companies. The Commission is adopting amendments to implement Title V and Title VI of the JOBS Act and Title LXXXV of the FAST Act.

In adopting rules or amendments, we are mindful of the costs imposed by and the

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<sup>113</sup> The amendment to Rule 12g5-1 is limited to determinations under Section 12(g). The definition of “foreign private issuer” in Exchange Act Rule 3b-4 contains a cross-reference to Rule 12g3-2(a) for purposes of calculating record ownership in determining whether more than 50% of an issuer’s outstanding voting securities are directly or indirectly held by residents of the United States. In contrast to the approach in Rule 12g3-2(a), Rule 3b-4 clarifies that securities held by employees must continue to be counted for the purpose of determining the percentage of the issuer’s outstanding securities held by U.S. residents, and thus for determining whether an issuer qualifies as a foreign private issuer. See Instruction to paragraph (c)(1) of Rule 3b-4. We are revising the Instruction to paragraph (c)(1)A.2. from the proposal to clarify that all of Rule 12g5-1(a)(8) does not apply for purposes of making a determination under Rule 405 as to foreign private issuer status.

<sup>114</sup> The definition of “foreign private issuer” under the Securities Act, which is found in Securities Act Rule 405, is the same as the definition under Exchange Act Rule 3b-4. We are similarly amending the foreign private issuer definition under Rule 405 to reinsert an omitted instruction with an identical revision to that in Rule 3b-4, clarifying that securities held by employees must continue to be counted for the purposes of determining the percentage of the issuer’s outstanding securities held by U.S. residents and foreign private issuer status under the Securities Act.

benefits obtained from our rules. The discussion below attempts to address the economic effects of the amendments, including the likely costs and benefits of the amendments as well as the effect of the amendments on efficiency, competition and capital formation.<sup>115</sup> Some of the costs and benefits stem from the statutory mandates of Title V and Title VI of the JOBS Act and Title LXXXV of the FAST Act, while others are affected by the discretion we exercise in revising our rules to reflect this mandate. For purposes of this economic analysis, we address the benefits and costs resulting from the mandatory statutory provisions and our exercise of discretion together because the two types of costs and benefits are not readily separable. We also analyze the benefits and costs of significant alternatives to the amendments that were suggested by commenters and that we considered on our own accord.

#### **A. Baseline**

The baseline for our economic analysis of the amendments, including the baseline for our consideration of the effects on efficiency, competition and capital formation, is the state of the market as well as market practices prior to enactment of the JOBS Act and the FAST Act. Prior to the JOBS Act, issuers were required to register a class of their equity securities with the Commission upon reaching 500 holders of record and total assets of \$10 million<sup>116</sup> and were allowed to terminate registration or suspend the duty to

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<sup>115</sup> Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act. 15 U.S.C. 78w(a). Further, Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

<sup>116</sup> See supra note 31.

file periodic and current reports with the Commission when the number of holders of record had fallen below 300, or below 500 and total assets had not exceeded \$10 million on the last day of each of the issuer's three most recent fiscal years. In addition, Exchange Act Rules 12h-1(f) and 12h-1(g) permitted issuers to exclude stock options issued under written compensatory benefit plans under certain conditions from the registration requirements of Section 12(g).

The JOBS Act raised the thresholds at which an issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g) and provided that persons holding certain employee compensation plan securities need not be counted when determining whether an issuer is required to register. The JOBS Act also raised the thresholds at which an issuer that is either a bank or a bank holding company is permitted to terminate registration or suspend reporting obligations with the Commission. These statutory changes were effective immediately upon signing of the JOBS Act. As a result, some banks and bank holding companies were newly eligible to terminate registration or suspend reporting. As of December 31, 2015, we estimate that approximately 103 such institutions have elected to do so.<sup>117</sup> We estimate that there are approximately 486 banks and bank holding companies that currently report to the Commission,<sup>118</sup> of which some may be eligible to terminate registration under the JOBS Act but have elected to continue reporting.

Subsequent to the JOBS Act, the FAST Act raised the thresholds at which savings

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<sup>117</sup> The Commission staff derived this estimate of the number of banks and bank holding companies that have elected to terminate registration or suspend reporting by analyzing Form 15 filings on EDGAR.

<sup>118</sup> The Commission staff derived this estimate by analyzing annual filings submitted to the Commission as of December 31, 2015 for the most recently completed fiscal year.

and loan holding companies are required to register and permitted to terminate registration or suspend reporting obligations to the same thresholds as apply to banks and bank holding companies. These statutory changes were effective immediately upon signing of the FAST Act. We estimate that, as of December 31, 2015, there are approximately 64 savings and loan holding companies that currently report to the Commission, approximately 28 of which are eligible to terminate registration or suspend reporting under the amendments.<sup>119</sup>

We are amending specified Exchange Act rules to reflect the new, higher threshold for banks, savings and loan holding companies and bank holding companies under Section 12(g)(4) and Section 15(d)(1). For those banks, savings and loan holding companies and bank holding companies that are eligible to terminate registration under Section 12(g), the amendments will provide the same procedural accommodations available to other issuers under current rules by permitting these institutions to suspend their reporting obligations immediately upon the filing of a certification on Form 15 with the Commission.

In addition, the amendments apply the definition of “accredited investor” in Securities Act Rule 501(a) in making determinations under Exchange Act Section 12(g)(1), revise the definition of “held of record” in Rule 12g5-1, and establish a non-exclusive safe harbor for issuers to rely on when determining whether securities were received pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act. The non-exclusive safe harbor, as adopted, permits an issuer to rely on the definition of

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<sup>119</sup> Id. We note, however, that 25 of these 28 savings and loan holding companies are listed on a national securities exchange and required to report under Section 12(b) of the Exchange Act. In order to cease reporting, these issuers would be required to delist from the exchange.



“compensatory benefit plan” in Securities Act Rule 701 and the conditions in Securities Act Rule 701(c) in determining whether a person has received securities pursuant to an employee compensation plan. It also permits an issuer to rely on a reasonable belief at the time of issuance that the securities were issued in a transaction exempt from, or not subject to, the registration requirements of Section 5.

We considered alternative definitions of “employee compensation plan.” We also considered whether to provide additional guidance with respect to the determination of accredited investor status when establishing the number of holders of record. These decisions may affect how a non-reporting issuer counts its holders of record for the purpose of the registration thresholds under the Exchange Act; hence, they could affect whether an issuer becomes subject to Exchange Act reporting. However, due to limited availability of shareholder information on these non-reporting issuers, we are unable to quantify the number of non-reporting issuers that might be affected by these decisions.

## **B. Analysis of the Amendments**

The amendments will affect reporting issuers generally, and banks, bank holding companies and savings and loan holding companies specifically, as well as non-reporting issuers, employees and other investors. We analyze the costs and benefits associated with the amendments below.

### **1. Increased regulatory thresholds for banks, savings and loan holding companies and bank holding companies**

As discussed above, the JOBS Act and the FAST Act amended Sections 12(g) and 15(d) of the Exchange Act to raise the thresholds at which banks, savings and loan holding companies and bank holding companies may terminate registration or suspend their obligations to file reports with the Commission from 300 to 1,200 holders of

record.<sup>120</sup> However, without the amendments being adopted today, banks, savings and loan holding companies and bank holding companies that want to use the higher thresholds must wait 90 days after filing a certification with the Commission that the number of holders of record is less than 1,200 persons to terminate their Section 12(g) registration and cease filing reports required by Section 13(a) and must wait until the first day of the fiscal year to suspend any Section 15(d) reporting obligations. For other issuers, our existing rules afford procedural accommodations that allow them to suspend their reporting obligations immediately upon the filing of a certification on Form 15.

To make these procedural accommodations applicable to banks, savings and loan holding companies and bank holding companies, as proposed, the amendments revise Exchange Act Rules 12g-2, 12g-3, 12g-4 and 12h-3 to reflect the 1,200 holders of record threshold for banks, savings and loan holding companies and bank holding companies. This will permit banks, savings and loan holding companies and bank holding companies to rely on these rules to cease reporting during a fiscal year, rather than wait the 90 days or until the end of the reporting year prescribed under the Exchange Act. This will reduce issuer compliance and reporting costs during the fiscal year the issuer ceases reporting<sup>121</sup> and may lessen potential confusion that could arise from the differences in the thresholds contained in the statute and our existing rules. At the same time, extending these procedural accommodations could accelerate the loss of investor access to current information about the issuer. We note, however that this effect is likely mitigated by the non-SEC regulatory disclosure requirements that will continue to apply to regulated

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<sup>120</sup> For other issuers, the threshold in Section 12(g)(4) for termination of registration and in Section 15(d)(1) for suspension of reporting remains at 300 holders of record.

<sup>121</sup> See letter from ABA indicating that these costs could be especially onerous for financially distressed firms and from ICBA.

banks, savings and loan holding companies and bank holding companies after adoption of today's amendments.

We believe that the amendments adopted under this rule will not have a significant impact on competition. To the extent that savings pursuant to lower compliance and reporting costs could possibly be used to increase institutions' lending activities, the amendments may lead to higher levels of investment and capital formation in the economy.

As stated above, we estimate that there are approximately 550 banks, savings and loan holding companies and bank holding companies that currently report with the Commission. Many of these reporting issuers have more than 1,200 holders of record and are not eligible to cease reporting under the new higher thresholds. However, approximately 192 of these reporting banks, savings and loan holding companies and bank holding companies have between 300 and 1,199 holders of record and may be eligible to cease reporting. Many of these banks and bank holding companies have likely been eligible to deregister or suspend reporting since the adoption of the JOBS Act, but have chosen to continue as reporting issuers. One explanation for why many of these issuers have chosen not to deregister is that most (143) are also listed on national securities exchanges and if they chose to deregister or suspend reporting under the Exchange Act, they would have to give up their national exchange listing.<sup>122</sup> While a higher percentage of savings and loan holding companies have become eligible to terminate their registration or suspend reporting under the FAST Act, approximately 50 of 64 reporting savings and loan holding companies are registered pursuant to Section

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<sup>122</sup> Listing on a national securities exchange triggers current and periodic Exchange Act reporting requirements under Section 12(b).

12(b). Based on staff research, most of the newly eligible savings and loan holding companies (approximately 25 of the 28) would have to delist from a national securities exchange to cease reporting under the Exchange Act.

We believe that the likelihood of large numbers of eligible banks, savings and loan holding companies and bank holding companies terminating registration or suspending reporting based on the new higher thresholds in future years is low. While a relatively larger number of banks and bank holding companies (69) relied on the new thresholds to exit Exchange Act reporting immediately after the adoption of the JOBS Act in 2012, the numbers of such issuers relying on the new thresholds to exit substantially decreased over the subsequent three years (18 in 2013, 7 in 2014 and 6 in 2015).<sup>123</sup> As banks and bank holding companies remain subject to other regulatory reporting requirements,<sup>124</sup> many have chosen to continue reporting, and bear ongoing reporting costs, even though they are eligible to cease reporting under Section 12(g) of the Exchange Act. We expect to see a similar trend with respect to the deregistrations of savings and loan holding companies.

In deciding whether to terminate registration or suspend their reporting obligations, we anticipate that banks, savings and loan holding companies and bank holding companies will weigh the benefits of being a public company against the burden of additional disclosure costs. Commonly cited benefits of being a public company

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<sup>123</sup> The Commission staff derived this estimate by analyzing Form 15 filings submitted to the Commission. These numbers indicate that approximately 4%, 1% and 1% of the reporting bank and bank holding companies deregistered during 2013, 2014 and 2015, respectively.

<sup>124</sup> The Board of Governors of the Federal Reserve System is responsible for the consolidated supervision of bank holding companies and savings and loan holding companies and requires those entities to provide data relating to capitalization, liquidity, and risk management as well as periodic financial reports in order for the Board of Governors to analyze the overall financial condition of those entities to ensure safe and sound operations.

include the ability to obtain a lower cost of capital for investment and growth, increased liquidity through a broader shareholder base, and greater ability to finance acquisitions and offer equity-based incentive contracts.<sup>125</sup> Commonly cited costs of being a public company include the need to comply with increased regulations and regulatory supervision, including requirements for independent audits,<sup>126</sup> disclosure of information to competitors, loss of control and ownership dilution.<sup>127</sup>

## 2. Use of the term “accredited investor” in Exchange Act Section 12(g)

Section 501 of the JOBS Act raises the number of holders of record at which an issuer is required to register a class of equity securities under the Exchange Act from 500 persons to 2,000 persons or 500 persons who are not accredited investors. In order for an issuer to rely on the new, higher threshold established by the JOBS Act, the issuer must

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<sup>125</sup> See J. Brau, Why Do Firms Go Public?, Oxford Handbook of Entrepreneurial Finance (2010) (providing a general discussion of the different rationales for firms to go public); U.Celikyurt, M. Sevilir, and A. Shivdasani, Going Public to Acquire? The Acquisition Motive in IPOs, J. FIN. ECON. (2010) (arguing that firms go public so as to facilitate acquisitions); M. Pagano, F. Panetta, and L. Zingales, Why Do Companies Go Public? An Empirical Analysis, J. FIN. (1998) (showing that initial public offerings are generally followed by lower cost of credit and increased turnover in control); T. Chemmanur and P. Fulghieri, A Theory of the Going Public Decision, REV. FIN.STUD. (1999) (arguing that going public broadens the ownership base of the firm); R. Rosen, S. Smart and C. Zutter, Why Do Firms Go Public? Evidence From the Banking Industry, Working Paper (2005) (finding that banks that go public are more likely to grow faster, earn higher profits, employ more leverage and become acquirers when compared to their non-reporting counterparts), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=686473](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=686473).

<sup>126</sup> See letter from IPA. IPA cited an estimate of ongoing reporting costs under the Exchange Act of \$650,000 annually. This commenter additionally noted that becoming an Exchange Act reporting company may be contrary to an issuer’s business plan and against investors’ economic interests. See also letter from ABA positing that once the initial cost of implementing reporting procedures are undertaken, the ongoing costs of reporting are not a significant burden on capital formation and job creation.

<sup>127</sup> See J. Brau and S. Fawcett, Initial Public Offerings: An Analysis of Theory and Practice, J. FIN. (2006) (reporting based on a survey of CFOs that “desire to maintain decision-making control,” “disclosing information to competitors,” “SEC reporting requirements” and “to avoid ownership dilution” are among the top five reasons why firms choose to stay private); J. Farre-Mensa, Why Are Most Firms Privately Held?, Working paper, Harvard University (2011) (documenting that firms in industries with high disclosure costs (i.e., where it is easier for competitors to appropriate a firm’s intellectual property) tend to remain private), available at [http://www.cemfi.es/ftp/pdf/papers/wshop/Farre-Mensa\\_JobMarketPaper.pdf](http://www.cemfi.es/ftp/pdf/papers/wshop/Farre-Mensa_JobMarketPaper.pdf).

make accredited investor determinations if it has more than 500 holders of record.

We are amending Exchange Act Rule 12g-1 to clarify that the definition of “accredited investor” in Securities Act Rule 501(a) applies when making determinations under Exchange Act Section 12(g)(1) and that such determination must be made as of the last day of the fiscal year rather than at the time of sale of the securities. Under Rule 501(a), an accredited investor is any person who comes within one or more of the categories of investors specified therein, or who the issuer reasonably believes comes within any such category. Many issuers and investors are familiar with the Rule 501(a) definition as it is a central component for private offerings conducted under Securities Act Rule 506 of Regulation D.<sup>128</sup> Consequently, the amendment should facilitate compliance.<sup>129</sup> Developing an alternative definition for purposes of Section 12(g)(1) could impose costs on issuers and investors by requiring them to familiarize themselves with, and apply, a new and different standard.<sup>130</sup> Due to limitations in available data, we are unable to estimate how many issuers will be impacted by using the Rule 501(a) definition of “accredited investor.”

Requiring issuers to make the accredited investor determination at the end of the fiscal year rather than at the time of sale of securities will ensure that the information is timely and consistent with issuers’ facts and circumstances at the end of each year. Permitting an issuer to rely on an ongoing basis on information previously obtained relating to accredited investors status, such as allowing reliance on information obtained

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<sup>128</sup> The Rule 501(a) definition is also used in connection with other unregistered offerings, for example for offerings conducted pursuant to amended Regulation A or the recently adopted Regulation Crowdfunding.

<sup>129</sup> See letter from ABA.

<sup>130</sup> Id.

by the issuer at the time the securities were initially issued to the investor or at the time the securities were most recently issued to the investor, would likely be less costly than requiring the issuer to establish a reasonable belief that the investor is an accredited investor. This, however, could also lead to reliance on outdated information, potentially causing issuers with more than 500 non-accredited investors to fail to register, thereby leaving investors in those issuers with less information and protection under the federal securities laws.

Not providing specific guidance or rules on how to establish a reasonable belief of a security holder's status as an accredited investor for purposes of determining holders of record could result in some uncertainty and possibly higher costs for issuers. We believe, however, that the "reasonable belief" standard under Rule 501(a) provides issuers with appropriate flexibility to use the method that works best, given their individual circumstances, to determine the accredited investor status of their shareholders. We also believe that this standard may help to mitigate some of the concerns relating to higher costs under the adopted provision by allowing issuers to rely on previous/other determinations if they have a reasonable belief that the security holder continues to be or is an accredited investor. We also note that many issuers are familiar with and routinely use the "reasonable belief" standard without such guidance when making private offerings in reliance on Regulation D.

Some commenters recommended that the Commission address potential compliance issues related to the accredited investor threshold by providing a safe harbor for determining accredited investor status.<sup>131</sup> A safe harbor could increase efficiency by

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<sup>131</sup> See letters from ABA, Foley and NYCBA. See also letters from ADISA, CFM, Cleary and IPA.

providing issuers with a prescribed process to determine and update the accredited investor status of their investors. For example, a safe harbor that permits an issuer to rely on an annual affirmation of accredited investor status by the investor, other information obtained by the issuer or on a combination of a certification and other information may be less costly than requiring an issuer to establish a reasonable basis for its determination through other means. Similarly, a safe harbor with specified time limits on the permitted use of the information<sup>132</sup> or conditioned upon the issuer not having information that the previously obtained information was incorrect, unreliable or had changed could address some of the concerns related to higher costs or outdated information. Another alternative would be a safe harbor that permits an issuer to rely on a third-party certification for determining the accredited investor status of investors.<sup>133</sup>

Despite the benefits described above, providing a specific method (or methods) under a safe harbor could become a de facto minimum standard which we believe would reduce the flexibility available to issuers for determining accredited investor status.<sup>134</sup> Moreover, at-least for some issuers, a prescribed method may be less accurate and more burdensome than alternate non-prescribed methods in establishing the accredited status of investors. For example, a safe harbor providing for annual certification could be costly

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<sup>132</sup> See letter from Cleary suggesting a safe harbor permitting accredited investor status determinations made in offerings during the three months prior to fiscal year-end or on self-certifications by investors if the offering occurred more than three months but less than twelve months prior to fiscal year-end.

<sup>133</sup> See letter from IPA suggesting that relying upon third parties might allow issuers to reduce the cost of compliance for accredited investor determinations. We do not have adequate information about third-party certification providers and the characteristics of this industry to assess this alternative in terms of reliability and cost of the provided certification services. To the extent that reputational concerns would incentivize third-party certification providers to perform reliable and updated due diligence, third-party certification could potentially provide accurate information at a cost that economies of scale may lessen.

<sup>134</sup> See letter from ABA.



and have adverse impacts on small issuers and their investors,<sup>135</sup> discouraging accredited investors from investing in their securities, and leading to lower levels of investment.<sup>136</sup>

### **3. Definition of “held of record” and safe harbor for employee compensation plan securities**

Section 12(g)(5), as amended by Section 502 of the JOBS Act, excludes from the definition of “held of record” 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 for purposes of determining whether an issuer is required to register a class of security pursuant to Section 12(g)(1).<sup>137</sup> Section 503 of the JOBS Act directs the Commission to adopt a safe harbor that issuers can use when making their holder of record determinations.

We believe that, by making it easier for non-reporting companies that issue securities to their employees to remain below the registration and reporting thresholds in the Exchange Act, the statutory changes will benefit issuers by allowing them to better control how and when they become subject to reporting requirements, while continuing to use securities to compensate employees.<sup>138</sup> These changes could be particularly beneficial for smaller or cash-constrained issuers that could more easily issue securities to their employees as a form of compensation without being subject to Exchange Act reporting requirements and the associated compliance costs.

However, investors in these issuers, including employees, may be adversely affected by a delay in the potential registration of a class of securities and the associated

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<sup>135</sup> See letter from IPA.

<sup>136</sup> See letter from CFM.

<sup>137</sup> Prior to the JOBS Act, employees who obtained securities under an issuer’s employee compensation plan were not excluded from the shareholders of record calculation.

<sup>138</sup> See letter from ABA.

reporting because they otherwise might benefit from the information provided through such reporting. As a result, the amendments to the definition of “held of record” and the non-exclusive safe harbor being adopted today could have an impact on the potential costs and benefits of Exchange Act registration for affected issuers and their investors by affecting areas such as the ease of relying upon the statutory exemption under Section 12(g), the number of non-reporting companies able to forestall registration, and the amount of information available to investors in those issuers’ securities, with effects, for example, on price efficiency and liquidity. We further discuss the economic impact of specific aspects of these amendments below.

Instead of establishing a new definition for the term “employee compensation plan,” we are amending the definition of “held of record” to permit an issuer to exclude securities held by persons who received them pursuant to an employee compensation plan in transactions exempted from, or not subject to, the registration requirements of Section 5 of the Securities Act and adopting a safe harbor providing that this condition will be satisfied if the securities were received pursuant to a compensatory benefit plan in transactions that meet the conditions of Rule 701(c). By not creating a new definition and relying on familiar concepts, the amendments should facilitate compliance and simplify recordkeeping by issuers.<sup>139</sup>

In a change from the proposal, we are revising the amendments to the definition of “held of record” to make clear that, in addition to securities issued to employees in transactions exempted from the registration requirements of Securities Act Section 5 (such as securities issued in a Rule 506 offering) or those issued to employees in

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<sup>139</sup> See letter from ABA.

transactions that did not involve a sale of securities within the meaning of Securities Act Section 2(a)(3), the amended definition also will permit issuers to exclude exempt securities issued to employees pursuant to Securities Act Section 3 (such as securities issued in a Regulation A or Rule 504 offering). The amendment will provide consistency in treatment of securities received pursuant to employee compensation plans in primary transactions that are exempt from Section 5 registration requirements or not subject to Section 5 registration requirements.<sup>140</sup> This could lower issuer costs and facilitate compliance. At the same time, such an expanded definition of “held of record” could reduce the number of holders of record of an issuer and potentially allow the issuers to delay or avoid Exchange Act reporting.

The amendments will permit issuers to exclude securities held by former employees who received the securities in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 in substitution or exchange for securities excludable under the proposed definition of held of record, as long as the former employees were eligible, at the time of issuance, to receive the original excludable securities. Relative to the proposal, the amended definition will also include such securities held by former employees who were employed by or providing services to a predecessor or an acquired company. By providing uniform treatment for all securities issued in exempt transactions, such provisions could lower issuer costs and facilitate compliance. Permitting exclusion of securities received by former employees and covered persons and securities exchanged or substituted for such original excludable securities also is likely to remove disincentives for issuers to engage in value-enhancing

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<sup>140</sup> Id.

business combinations or other similar transactions,<sup>141</sup> which will benefit issuers and their investors. In this way, the amendments may also lead to a more efficient allocation of resources amongst firms that could improve growth prospects over the longer run.

As proposed, the amendments establish a non-exclusive safe harbor that issuers can rely on when determining whether holders of securities received pursuant to an employee compensation plan may be excluded. Consistent with the proposal, the safe harbor being adopted relies on the conditions in existing Rule 701(c). Relying on an existing standard that is already understood by market participants will make it easier for issuers to avail themselves of this safe harbor than if we proposed a new alternative standard. While generally broad in application, the conditions in Rule 701(c) impose certain limitations, such as requiring that securities be sold under a compensatory benefit plan, that the plan be written, that the plan be established by the issuer or certain specified related entities and that participation be limited to employees and certain other specified persons. Although we are unable to quantify the impact of adopting this safe harbor, as we cannot reliably predict the number of issuers that would rely on it, we can qualitatively assess its impact. A safe harbor that applies the familiar concepts of existing Rule 701(c) should create efficiencies in its application and avoid conflicts with existing rules, which could reduce costs, especially for smaller issuers.<sup>142</sup>

In a change from the proposal, the safe harbor also includes a reasonable belief standard. The inclusion of such a standard will obviate the need for issuers to re-establish that earlier issuances satisfied an appropriate exemption at the time of issuance. This

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<sup>141</sup> Id.

<sup>142</sup> See letter from ABA which states that Rule 701 is the primary exemption relied upon by smaller and other non-reporting issuers for such transactions.

should provide greater regulatory certainty, leading to lower compliance burdens for issuers.<sup>143</sup> Similarly, the interpretative guidance set forth in this release regarding transfers to family members of such exempt securities through the employee’s death, disability or domestic relations order provides greater regulatory certainty with respect to specific circumstances that are unexpected or out of control of the issuer, which will benefit issuers intending to use equity compensation.<sup>144</sup>

Finally, as proposed, the amendments also provide that foreign private issuers will be able to rely on the adopted safe harbor when making their determination of the number of U.S. resident holders under Exchange Act Rule 12g3-2(a). While we are unable to quantify the number of foreign private issuers that will be impacted due to limitations in the available data, the amendments may allow some foreign private issuers to delay registering with and reporting to the Commission. The cost and benefit tradeoffs of Exchange Act registration for foreign private issuers will be analogous to the ones discussed above for domestic issuers. Additionally, the flexibility accorded by the amendments will benefit the U.S.-based employees of foreign private issuers by putting them on equal footing with employees in domestic private companies.<sup>145</sup>

## **V. PAPERWORK REDUCTION ACT**

Certain provisions of our disclosure rules and forms applicable to issuers contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>146</sup> The hours and costs associated with preparing and filing forms

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<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> 44 U.S.C. 3501 et seq.

and retaining records constitute reporting and cost burdens imposed by the collection of information requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid Office of Management and Budget (“OMB”) control number.

Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the collections of information.

The amendments adopted today do not alter the disclosure requirements set forth in our rules and forms; however, the JOBS Act and FAST Act amendments to Exchange Act Sections 12(g) and 15(d) and the amendments to our rules to reflect those statutory amendments are expected to insubstantially decrease the number of filings made pursuant to these rules and forms. Exchange Act Rules 12g-1, 12g-2, 12g-3, 12g-4 and 12h-3 set forth when an issuer’s securities are required to be registered and the procedures for a registrant to terminate its registration or suspend its duty to file reports. The amendments provide thresholds that issuers may rely on when determining their registration and reporting obligations.<sup>147</sup> Exchange Act Section 12(g)(5) and the amendment to Exchange Act Rule 12g5-1 also exclude securities received pursuant to certain employee compensation plans from the determination of when an issuer is required to initially register with the Commission. These changes will reduce the number of registrants required to initially register a class of securities with the Commission as well as accelerate the ability of some registrants to cease filing after they have crossed below the statutory thresholds. For purposes of the PRA, as discussed below, we estimate that the

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<sup>147</sup> We also are amending Rule 12g-1 to reflect the new higher thresholds in Section 12(g)(1).

amendments will not substantially reduce the number of filings received, nor will they affect the incremental burden or cost per filing.

The titles for the affected collections of information are:

- (1) “Form 10” (OMB Control No. 3235-0064);<sup>148</sup>
- (2) “Form 20-F” (OMB Control No. 3235-0288);<sup>149</sup>
- (3) “Form 40-F” (OMB Control No. 3235-0381);<sup>150</sup>
- (4) “Form 10-K” (OMB Control No. 3235-0063);<sup>151</sup>
- (5) “Form 10-Q” (OMB Control No. 3235-0070);<sup>152</sup>
- (6) “Form 8-K” (OMB Control No. 3235-0060);<sup>153</sup>
- (7) “Schedule 14A” (OMB Control No. 3235-0059);<sup>154</sup>
- (8) “Schedule 14C” (OMB Control No. 3235-0057);<sup>155</sup> and
- (9) “Form 15” (OMB Control No. 3235-0167);

The forms were adopted under the Exchange Act and the Securities Act and set forth the disclosure requirements for periodic, current and other reports required to be filed by issuers registered with the Commission.

We estimate that there are approximately 579 Exchange Act registrants that are bank holding companies or savings and loan holding companies. We estimate that approximately 100 bank holding companies have filed Forms 15 to terminate or suspend

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<sup>148</sup> 17 CFR 249.10.

<sup>149</sup> 17 CFR 249.220f.

<sup>150</sup> 17 CFR 249.240f.

<sup>151</sup> 17 CFR 249.310.

<sup>152</sup> 17 CFR 249.308a.

<sup>153</sup> 17 CFR 249.308.

<sup>154</sup> 17 CFR 240.14a-101.

<sup>155</sup> 17 CFR 240.14c-101.

their reporting obligations under the Exchange Act based on the statutory changes in the JOBS Act.<sup>156</sup> To put these numbers in context, the current PRA estimate for the number of annual reports on Form 10-K filed annually is 8,137. Moreover, for certain changes, such as the amendments to the definition of “held of record” in Rule 12g5-1, we do not have access to data to support a reliable estimate of the number of issuers that will not be required to file reports based on the JOBS Act amendments and our implementation of those amendments.

As explained in the Proposing Release, because the rule amendments are not expected to substantially impact the overall burden estimates associated with our rules and forms and in light of the limitations on available data, we have not submitted revised burden estimates for these collections of information to OMB for review in accordance with the PRA and its implementing regulations.<sup>157</sup> However, as we periodically update our PRA estimates in accordance with applicable regulations, we will make any necessary adjustments to reflect the actual number of filings received, including adjustments to reflect any reduction in filings arising from today’s amendments.

## **VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS**

This Final Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 604. This analysis relates to the amendments to Securities Act Rule 405 and Exchange Act Rules 3b-4, 12g-1, 12g-2, 12g-3, 12g-4, 12g5-1, and 12h-3.

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<sup>156</sup> After the JOBS Act became effective, there was an increase in the number of termination and suspension of registrations by bank holding companies. We do not anticipate a similar rate of deregistration for bank holding companies after revising our rules to reflect the new, higher deregistration threshold. As the FAST Act was only recently enacted, we do not have data on the number of savings and loan holding companies seeking to deregister. However, we do not expect the rate of deregistration for savings and loan holding companies to be as high as for bank holding companies, as many of the newly eligible savings and loan holding companies (20 of 26) would have to give up an exchange listing in order to terminate registration and suspend reporting.

<sup>157</sup> 44 U.S.C. 3507(d); 5 CFR 1320.11.



**A. Need for, and Objectives of, the Action**

The primary reason for, and objective of, the proposed amendments is to implement Title V and Title VI of the JOBS Act and Title LXXXV of the FAST Act. The JOBS Act directs the Commission to issue rules to implement the statutory changes and specifically charges the Commission with amending the definition of “held of record” and establishing a safe harbor for the determination relating to “employee compensation plan” securities. The amendments adopted today revise existing rules to reflect the new, higher Exchange Act registration, termination of registration and suspension of reporting thresholds for banks, savings and loan holding companies and bank holding companies, apply the definition of “accredited investor” in Securities Act Rule 501(a) in making determinations under Exchange Act Section 12(g)(1), revise the definition of “held of record” to exclude certain securities held by persons who received them pursuant to employee compensation plans, and establish a non-exclusive safe harbor for issuers to follow when determining whether those securities are “held of record.” Additionally, revising the definition and providing a non-exclusive safe harbor to issuers relating to the determination of securities “held of record” will assist issuers in determining which holders of record they are required to count under the registration requirements of Exchange Act Section 12(g).

**B. Significant Issues Raised by Public Comment**

In the Proposing Release, we requested comment on all aspects of the Initial Regulatory Flexibility Act (“IRFA”), including the number of small entities that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA.

We did, however, receive comments from members of the public on matters that could potentially impact small entities. Several commenters recommended a safe harbor for the establishment of a reasonable belief of accredited investor status.<sup>158</sup> In contrast, one commenter opposed such a safe harbor out of concern that it would become a de facto minimum standard.<sup>159</sup> Commenters also sought additional guidance or revisions to the proposed amendment to Rule 12g5-1 and Securities Act Rule 701.<sup>160</sup>

### C. Small Entities Subject to the Rule Amendments

Exchange Act Rule 0-10(a)<sup>161</sup> defines an entity, other than an investment company, to be a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.<sup>162</sup> We estimate that there are approximately 841 issuers that file with the Commission, other than investment companies, that may be considered small entities.<sup>163</sup>

The rule amendments establishing the use of the Securities Act Rule 501(a) definition of “accredited investor” under Exchange Act Section 12(g)(1) and revising the definition of “held of record” to exclude certain securities and establish a non-exclusive

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<sup>158</sup> See letters from ADISA, CFM, Cleary, IPA. One commenter recommended a safe harbor for the determination specifically for private investment funds.

<sup>159</sup> See letter from ABA.

<sup>160</sup> See letters from ABA and ADISA.

<sup>161</sup> 17 CFR 240.0-10(a).

<sup>162</sup> 17 CFR 270.0-10(a).

<sup>163</sup> The staff estimate is based on a review of Form 10-K, 20-F, 40-F filings (from EDGAR XBRL) with fiscal periods ending between January 31, 2015-January 31, 2016.

safe harbor may affect small issuers relying on the revised rules and safe harbor to determine the number of holders of record. While an issuer is not required to register a class of equity securities pursuant to Section 12(g) of the Exchange Act until the issuer's total assets exceed \$10 million, a small business or small organization may rely on the rules when determining to whom to issue securities and whether to compensate employees with securities. By providing guidance on the meaning of the term "accredited investor" in the Exchange Act context, the rule amendments may facilitate private offerings and the ability of an issuer to determine their registration and reporting obligations. By excluding certain employee compensation securities from the definition of "held of record," the rule amendments may facilitate the use of equity compensation by small issuers, thereby helping them to preserve cash and giving them greater ability to determine when the Exchange Act Section 12(g) registration obligation would be triggered.

We cannot reliably estimate the number of small entities affected by these rule amendments. By definition, such entities are not yet subject to Section 12(g) registration and reporting requirements, which are triggered by the issuer having total assets exceeding \$10 million as of the last day of its fiscal year. We do not otherwise have information about the number of shareholders at small entities, including those who have received securities as a result of employee compensation plans.

#### **D. Reporting, Recordkeeping and Other Compliance Requirements**

The amendments' use of the Securities Act Rule 501(a) definition of "accredited investor" and the definition of "held of record" will assist an issuer in determining the number of holders of record. In order for an issuer to rely on the safe harbor, the securities must be issued in a transaction exempt from, or not subject to, the registration

requirements of Securities Act Section 5 and satisfy the requirements of Securities Act Rule 701(c), which includes the requirement that the securities be offered or sold under a written compensatory benefit plan or written compensation contract. In addition, issuers seeking to rely upon the safe harbor may need to maintain records to help establish their compliance with the conditions of the safe harbor.

The rule amendments affecting banks, bank holding companies and savings and loan holding companies do not create any new reporting, recordkeeping or other compliance requirements for those entities. The rule amendments raise the thresholds relating to registration for those entities and therefore reduce their compliance burdens.

**E. Agency Action to Minimize Effect on Small Entities**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the rule amendments, we considered the following alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rules, or any part of the rules, for small entities.

We are applying the current definition of “accredited investor” in Securities Act Rule 501(a) in making determinations under Exchange Act Rule 12g-1(b)(1).

Alternatively, we could have developed a new definition of “accredited investor” for purposes of Section 12(g)(1); however, given the prevalence of the use of Regulation D for exempt offerings, many issuers are familiar with and rely upon the definition in Rule

501(a). The increased registration threshold established by the JOBS Act is intended to permit issuers, including small entities, to defer Exchange Act registration until issuers have a larger shareholder base. Because proposed Rule 12g-1(b)(1) is intended to facilitate an issuer's ability to make the determination of when it is required to register, we believe use of the familiar performance standard in Rule 501(a) definition of "accredited investor" will further this regulatory objective for all issuers, including small entities.

We determined not to propose or adopt a safe harbor for the determination of accredited investor status. Requiring issuers to consider their particular facts and circumstances to establish a reasonable basis for their determination will provide issuers with flexibility in making the determination and diminish concerns that the information relied upon could be unreliable. Additionally, some standards that might be included in a safe harbor could, as one commenter noted, result in establishing a de facto minimum standard for the determination.<sup>164</sup> This could shift the standard from a performance standard to a design standard which would provide issuers with less flexibility when making the determination.

The revised definition of "held of record" and related safe harbor apply to all issuers, including small entities, that choose to exclude securities held by persons who received them pursuant to employee compensation plans in transactions exempt from, or not subject to, the registration requirements of Securities Act Section 5. The amendment and safe harbor help define the contours of an exemption from registration for issuers that might otherwise cross the Section 12(g) registration thresholds.

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<sup>164</sup> See letter from ABA.

The amendments are intended to permit issuers, including small entities, to exclude certain securities from the “held of record” determination and to assist issuers in making that determination by clarifying and simplifying requirements for all entities. Establishing different compliance or reporting requirements relating to employee compensation plan securities or accredited investor determinations for small entities could complicate the rules and make them more difficult to apply as those issuers grow, cease to be small entities, and are required to determine whether they must register with the Commission. With respect to the use of performance standards rather than design standards, we note that the holder of record threshold is a statutorily created design standard, requiring issuers to register if their holders of record coupled with their total assets cross certain thresholds. As we are modifying the definition of “held of record” and clarifying the determination of “accredited investor” under this statutory design standard, we did not evaluate whether a performance standard would be more useful.

## **VII. STATUTORY AUTHORITY AND TEXT OF RULE AMENDMENTS**

The amendments contained in this release are being adopted under the authority set forth in Section 19 of the Securities Act, as amended, Sections 3(b), 12(g), 12(h), 15(d) and 23(a) of the Exchange Act, as amended, and Section 503 and Section 602 of the JOBS Act.

### **List of Subjects in 17 CFR Parts 230 and 240**

Reporting and recordkeeping requirements, Securities.

### **TEXT OF THE AMENDMENTS**

For the reasons set out above, the Commission amends Title 17, chapter II of the Code of Federal Regulations as follows:

**PART 230 - GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

1. The authority citation for part 230 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77b, 77b note, 77c, 77d, 77d note, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

\* \* \* \* \*

2. Amend § 230.405 by adding a Note to paragraph (1) of the definition of “Foreign private issuer” to read as follows:

**§ 230.405 Definitions of terms.**

\* \* \* \* \*

*Foreign private issuer.* (1) \* \* \*

NOTE TO PARAGRAPH (1) OF THE DEFINITION OF *Foreign private issuer*: To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in § 240.12g3-2(a) of this chapter, except that:

(1) The inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(i) The United States,

(ii) The issuer’s jurisdiction of incorporation, and

(iii) The jurisdiction that is the primary trading market for the issuer’s voting securities, if different than the issuer’s jurisdiction of incorporation; and

(2) Notwithstanding § 240.12g5-1(a)(8) of this chapter, the issuer shall not exclude securities held by persons who received the securities pursuant to an employee compensation plan.

B. If, after reasonable inquiry, the issuer is unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, the issuer may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership provided to the issuer or filed publicly and based on information otherwise provided to the issuer.

\* \* \* \* \*

#### **PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

3. The general authority citation for part 240 is revised to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. No. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*



4. Amend § 240.3b-4 by redesignating the Instruction to paragraph (c)(1) as Note to paragraph (c)(1) , and revising newly redesignated Note to paragraph (c)(1) to read as follows:

**§ 240.3b-4 Definition of “foreign government,” “foreign issuer” and “foreign private issuer”.**

\* \* \* \* \*

(c) \* \* \*

NOTE TO PARAGRAPH (c)(1): To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in § 240.12g3-2(a), except that:

(1) Your inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

- (i) The United States,
- (ii) Your jurisdiction of incorporation, and
- (iii) The jurisdiction that is the primary trading market for your voting securities,

if different than your jurisdiction of incorporation; and

(2) Notwithstanding § 240.12g5-1(a)(8) of this chapter, you shall not exclude securities held by persons who received the securities pursuant to an employee compensation plan.

B. If, after reasonable inquiry, you are unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, you

may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership provided to you or filed publicly and based on information otherwise provided to you.

\* \* \* \* \*

5. Revise § 240.12g-1 to read as follows:

**§ 240.12g-1 Registration of securities; Exemption from section 12(g).**

An issuer is not required to register a class of equity securities pursuant to section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)) if on the last day of its most recent fiscal year:

(a) The issuer had total assets not exceeding \$10 million; or

(b) (1) The class of equity securities was held of record by fewer than 2,000 persons or 500 persons who are not accredited investors (as such term is defined in § 230.501(a) of this chapter, determined as of such day rather than at the time of the sale of the securities); or

(2) The class of equity securities was held of record by fewer than 2,000 persons in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

6. Revise § 240.12g-2 to read as follows:

**§ 240.12g-2 Securities deemed to be registered pursuant to section 12(g)(1) upon termination of exemption pursuant to section 12(g)(2)(A) or (B).**

Any class of securities that would have been required to be registered pursuant to section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)) except for the fact that it was exempt from such registration by section 12(g)(2)(A) of the Act (15 U.S.C. 78l(g)(2)(A)) because it was listed and registered on a national securities exchange, or by section 12(g)(2)(B) of the Act (15 U.S.C. 78l(g)(2)(B)) because it was issued by an investment company registered pursuant to section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), shall upon the termination of the listing and registration of such class or the termination of the registration of such company and without the filing of an additional registration statement be deemed to be registered pursuant to section 12(g)(1) of the Act if at the time of such termination:

(a) The issuer of such class of securities has elected to be regulated as a business development company pursuant to sections 55 through 65 of the Investment Company Act of 1940 (15 U.S.C. 80a-54 through 64) and such election has not been withdrawn; or

(b) Securities of the class are not exempt from such registration pursuant to section 12 of the Act (15 U.S.C. 78l) or rules thereunder and all securities of such class are held of record by 300 or more persons, or 1,200 or more persons in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

7. Amend § 240.12g-3 by revising paragraphs (a)(2), (b)(2), and (c)(2) to read as follows:

**§240.12g-3 Registration of securities of successor issuers under section 12(b) or 12(g).**

(a) \* \* \*

(2) All securities of such class are held of record by fewer than 300 persons, or 1,200 persons in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

\* \* \* \* \*

(b) \* \* \*

(2) All securities of such class are held of record by fewer than 300 persons, or 1,200 persons in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

\* \* \* \* \*

(c) \* \* \*

(2) All securities of such class are held of record by fewer than 300 persons, or 1,200 persons in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

\* \* \* \* \*

8. Amend § 240.12g-4 by revising paragraph (a) to read as follows:

**§ 240.12g-4 Certifications of termination of registration under section 12(g).**

(a) Termination of registration of a class of securities under section 12(g) of the Act (15 U.S.C. 78l(g)) shall take effect 90 days, or such shorter period as the Commission may determine, after the issuer certifies to the Commission on Form 15 (§ 249.323 of this chapter) that the class of securities is held of record by:

(1) Fewer than 300 persons, or in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), 1,200 persons; or

(2) Fewer than 500 persons, where the total assets of the issuer have not exceeded \$10 million on the last day of each of the issuer's most recent three fiscal years.

\* \* \* \* \*

9. Amend § 240.12g5-1 by adding paragraph (a)(8) to read as follows:

**§ 240.12g5-1 Definition of securities "held of record".**

(a) \* \* \*

(8)(i) For purposes of determining whether an issuer is required to register a class of equity securities with the Commission pursuant to section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)), an issuer may exclude securities:

(A) Held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of section 5 of the Securities Act of 1933 (15 U.S.C. 77e); and

(B) Held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of section 5 of the Securities Act (15 U.S.C. 77e) from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for excludable securities under paragraph (a)(8)(i)(A) of this section, as long as the persons were eligible to receive securities pursuant to § 230.701(c) of this chapter at the time the excludable securities were originally issued to them.

(ii) As a non-exclusive safe harbor under this paragraph (a)(8):

(A) An issuer may deem a person to have received the securities pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of § 230.701(c) of this chapter; and

(B) An issuer may, solely for the purposes of Section 12(g) of the Act (15 U.S.C. 78l(g)(1)), 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 (15 U.S.C. 77e) if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

\* \* \* \* \*

10. Amend § 240.12h-3 by revising paragraph (b)(1) to read as follows:

**§ 240.12h-3 Suspension of duty to file reports under section 15(d).**

\* \* \* \* \*

(b) \* \* \*

(1) Any class of securities, other than any class of asset-backed securities, held of record by:

(i) Fewer than 300 persons, or in the case of a bank; a savings and loan holding company, as such term is defined in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461); or a bank holding company, as such term is defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), 1,200 persons; or

(ii) Fewer than 500 persons, where the total assets of the issuer have not exceeded \$10 million on the last day of each of the issuer's three most recent fiscal years; and

\* \* \* \* \*

By the Commission.

May 3, 2016

Brent J. Fields  
Secretary