

# Alerts & Publications

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## SEC Staff Publishes FAQs on JOBS Act Amendments to Exchange Act Registration Thresholds

April 12, 2012

On April 11, 2012, the Staff of the Securities and Exchange Commission's Division of Corporation Finance released a second set of responses to "Frequently Asked Questions" regarding the JOBS Act.<sup>[1]</sup> These FAQs address amendments to the Securities Exchange Act of 1934 that affect the requirement of issuers (including bank holding companies) to register a class of equity securities under Section 12(g) and file Exchange Act reports under Section 15(d). The full text of the new FAQs is located [here](#).

The JOBS Act made significant changes to Section 12(g) and Section 15(d) of the Exchange Act. Title V of the JOBS Act changes Section 12(g) with regard to issuers other than banks and bank holding companies. Title VI of the JOBS Act changes Section 12(g) and Section 15(d) with regard to banks and bank holding companies. Pursuant to Title V and Title VI of the JOBS Act:

- For issuers other than banks or bank holding companies, the Section 12(g) holders of record standard requiring registration of a class of equity securities was raised from 500 or more persons to either (i) 2,000 or more persons or (ii) 500 or more persons who are not accredited investors.
- For banks and bank holding companies (as defined in the Bank Holding Company Act of 1956):
  - the Section 12(g) holders of record standard was revised such that

these issuers will have a Section 12(g) registration obligation as of any fiscal year-end after April 5, 2012 with respect to a class of equity securities held of record by 2,000 or more persons;

- the holders of record threshold for Section 12(g) deregistration for these issuers was increased from 300 to 1,200 persons; and
  - the holders of record threshold for the suspension of reporting under Section 15(d) by these issuers was increased from 300 to 1,200 persons.
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- In calculating the number of holders of record for purposes of Section 12(g), all issuers (including banks and bank holding companies) may now exclude persons who received securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act of 1933.

### **Issuers Other Than Bank Holding Companies**

An issuer that triggered a Section 12(g) registration obligation for a class of equity securities as of a fiscal year-end before April 5, 2012, but would not trigger the Section 12(g) registration obligation with respect to that class of equity securities under the amended standard, is no longer subject to a Section 12(g) registration obligation with respect to that class. The Staff provided the following guidance with regard to such an issuer:

- if the issuer has not filed an Exchange Act registration statement, it is no longer required to do so;
- if the issuer has filed an Exchange Act registration statement and the registration statement is not yet effective, the issuer may withdraw the registration statement; or
- if the issuer has registered the class of equity securities under Section 12(g), the issuer must continue that registration unless it is eligible to deregister under Section 12(g) or current SEC rules. (Question 1)

### **Bank Holding Companies**

The amendments to Section 12(g) eliminate any Section 12(g) registration obligation of a bank holding company with respect to a class of equity securities as of a fiscal year-end on or before April 5, 2012.[2]

- Due to these amendments to Section 12(g), a bank holding company that triggered a Section 12(g) registration obligation for a class of equity securities as of a fiscal year-end before April 5, 2012, but would not trigger the Section 12(g) registration obligation with respect to that class of equity securities under the amended standard, is no longer subject to a Section 12(g) registration obligation with respect to that class. The Staff provided the following guidance with regard to such a banking holding company:
  - if the bank holding company has filed an Exchange Act registration statement and the registration statement is not yet effective, the bank holding company may withdraw the registration statement; or

- if the bank holding company has registered a class of equity securities under Section 12(g), the bank holding company must continue that registration unless it is eligible to deregister under Section 12(g) or current SEC rules. (Question 2)
- Bank holding companies now may terminate the Section 12(g) registration of a class of equity securities if the number of record holders of that class falls below 1,200 persons. The Staff provided the following guidance on how to accomplish termination of registration under Section 12(g) when the number of record holders of a class of equity securities of a bank holding company falls below 1,200 persons:
  - The bank holding company should file a Form 15 to terminate the Section 12(g) registration. Because Form 15 has not yet been amended to reflect the above changes, the bank holding company should include an explanatory note in its Form 15 noting its reliance on Exchange Act Section 12(g)(4) to terminate its duty to file reports with respect to the class of equity securities.
  - Pursuant to Section 12(g)(4), the Section 12(g) registration will be terminated 90 days after the Form 15 filing. Until termination of the registration under Section 12(g)(4), the bank holding company must continue to file all reports required by Exchange Act Sections 13(a), 14 and 16.
  - Rather than relying on the deregistration provision in Section 12(g)(4), a bank holding company, upon the filing of a Form 15, may rely on Exchange Act Rule 12g-4 to immediately suspend its reporting obligations. Rule 12g-4, however, has not yet been amended to incorporate the 1,200 record holder deregistration threshold. Accordingly, the bank holding company must meet the existing requirements of Rule 12g-4 (300 holders of record) to rely upon it for suspension of its reporting obligations. (Question 3)
- Bank holding companies now may suspend their Section 15(d) Exchange Act reporting obligations if the number of record holders of each class of securities offered pursuant to a Securities Act registration statement that triggered the Section 15(d) reporting obligations is less than 1,200 persons following the year in which the registration statement went effective. The Staff provided the following guidance with respect to the Section 15(d) amendments:
  - “For the current fiscal year, a bank holding company can suspend its obligation to file reports under Section 15(d) with respect to a class of security that was sold pursuant to a Securities Act registration statement and that was held of record by less than 1,200 persons as of the first day of the current fiscal year. Such suspension would be deemed to have occurred as of the beginning of the fiscal year in accordance with Section 15(d) (as amended by the JOBS Act).”
  - “If during the current fiscal year, a bank holding company has a registration statement that becomes effective or is updated pursuant to Securities Act Section 10(a)(3), then it will have a Section 15(d) reporting obligation for the current fiscal year.”

- In the case of a bank holding company with a class of equity securities held of record by less than 1,200 persons as of the first day of the current fiscal year that has updated a registration statement pursuant to Section 10(a)(3), but no sales have occurred in the current fiscal year, the Staff noted that such bank holding company may be eligible for no-action relief to suspend its Section 15(d) reporting obligation. The bank holding company should contact the Division's Office of Chief Counsel for more information. (Question 4)

### **All Issuers -- Calculating the Number of Record Holders**

Section 502 of the JOBS Act amends Section 12(g)(5) to provide that “the definition of ‘held of record’ shall not include securities held by persons who received securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act of 1933.” Section 503 of the JOBS Act requires the SEC to revise the definition of “held of record” in its rules to implement this change to Section 12(g)(5) and to adopt a safe harbor for issuers to follow when applying the amendment to Section 12(g)(5). The Staff provided guidance that:

- As of April 5, 2012, an issuer (including a bank holding company) calculating the number of holders of record of a class of equity securities may exclude any person who received securities pursuant to an employee compensation plan in exemption transactions regardless of whether such person continues to be employed by the issuer.
- The SEC plans to propose and adopt “safe harbor provisions” that issuers can follow when determining whether holders of securities received such securities “pursuant to an employee compensation plan in transactions that were exempt from the registration requirements of Section 5 of the Securities Act.” While this safe harbor, when adopted, will provide greater certainty to issuer, the amendments to Section 12(g)(5) are effective and may be relied upon by issuers calculating the number of holders of record of a class of equity securities. (Question 5)

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[1] “The Staff released FAQs with regard to the confidential submission of draft registration statements by emerging growth companies on April 10, 2012 (our alert on these FAQs is available [here](#)).

[2] The Staff noted that these FAQs relate only to bank holding companies, as Exchange Act Section 12(i) provides that banks are not required to register their securities or file reports with the SEC.

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For more information regarding these FAQs, please contact your regular O'Melveny & Myers LLP attorney. Additional information regarding the JOBS Act is on the **JOBS Act portion** of our website.

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