SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 230 AND 240

Release No. 33-9693; 34-73876; 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: Proposed rule.

SUMMARY: We are proposing amendments to our rules to implement Title V and Title VI of the Jumpstart Our Business Startups Act (the "JOBS Act"). The proposed amendments would revise rules adopted under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") to reflect the new, higher thresholds for registration, termination of registration and suspension of reporting that were set forth in the JOBS Act. The proposed rules also would apply the thresholds specified for banks and bank holding companies to savings and loan holding companies. In addition, the proposed amendments would revise the definition of "held of record" in Exchange Act Rule 12g5-1, 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: Comments should be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an email to rule-comments@sec.gov. Please include File Number S7-12-14 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-12-14. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Senior Special Counsel, at (202) 551-3430, or Anne Krauskopf, Senior Special Counsel, at (202) 551-3500, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Rules 3b-4,[1] 12g-1,[2] 12g-2,[3] 12g-3,[4] 12g-4,[5] 12g5-1,[6] and 12h-3[7] under the Exchange Act[8] and an amendment to Rule 405[9] under the Securities Act of 1933 (the "Securities Act"). [10]

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1 17 CFR 240.3b-4.

2 17 CFR 240.12g-1.

3 17 CFR 240.12g-2.

4 17 CFR 240.12g-3.

5 17 CFR 240.12g-4.

6 17 CFR 240.12g5-1.

7 17 CFR 240.12h-3.

8 15 U.S.C. 78a et seq.

9 17 CFR 230.405.

10 15 U.S.C. 77a et seq.

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I. INTRODUCTION

Prior to the enactment of the JOBS Act,[11] Section 12(g) of the Exchange Act[12] required an issuer to register a class of its equity securities if, at the end of the issuer's fiscal year, the securities were "held of record" by 500 or more persons and the issuer had total assets exceeding $1 million.[13] Under Section 12(g) and the Commission's rules prior to the JOBS Act amendments, an issuer that had a class of equity securities registered under Section 12(g) was able to terminate that registration if the number of record holders of that class fell below 300, or the number of record holders of that class

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11 Pub. L. No. 112-106, 126 Stat. 325 (Apr. 5, 2012).

12 15 U.S.C. 78l(g). Congress enacted Section 12(g) in 1964 following the release of a study of the securities markets conducted by the staff of the Commission in the early 1960s, which was commissioned by Congress to serve as a basis for legislation. Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 88-95 (1963). Section 12(g) was enacted to "improve investor protection by extending to the larger companies in the over-the-counter market the registration, reporting, proxy solicitation, and insider trading requirements … applicable to companies listed on an exchange." Report of the Committee on Banking and Currency to Accompany, S.1642, S. Rep. No. 88-379 (1963) at 1.

13 See 15 U.S.C. 78l(g)(1). The Commission has the authority, under Section 12(h), to raise the asset threshold for Section 12(g) registration. 15 U.S.C. 78l(h). The Commission raised the asset threshold for Section 12(g) registration from $1 million to $3 million in 1982, $5 million in 1986 and $10 million in 1996. See System of Classification for Purposes of Exempting Smaller Issuers From Certain Reporting and Other Requirements, Release No. 34-18647 (Apr. 15, 1982) [47 FR 17046 (Apr. 21, 1982)], Reporting by Small Issuers, Release No. 34-23406 (Jul. 8, 1986) [51 FR 25360 (Jul. 14, 1986)], and Relief From Reporting by Small Issuers, Release No. 34-37157 (May 1, 1996) [61 FR 21353 (May 9, 1996)]. For the thresholds applicable to foreign private issuers, see infra note 84 and the discussion in the following text.

fell below 500 and the issuer's assets were no more than $10 million at the end of each of its last three fiscal years.[14]

Exchange Act Section 15(d)[15] requires an issuer with an effective registration statement under the Securities Act to file the same reports as an issuer with a registered class of securities under Exchange Act Section 12. Prior to the enactment of the JOBS Act, an issuer's reporting obligation was automatically suspended under Section 15(d)(1) if, on the first day of any fiscal year other than the year in which the registration statement became effective, there were fewer than 300 holders of record of the class of securities offered under the registration statement.

The JOBS Act amended Sections 12(g) and 15(d) of the Exchange Act to adjust the thresholds for registration, termination of registration and suspension of reporting.[16] Specifically, Section 501 of the JOBS Act[17] amended Section 12(g)(1) of the Exchange Act 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[18] further amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or a bank holding company, as defined in

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14 See 15 U.S.C. 78l(g)(4) and 17 CFR 240.12g-4(a).

15 15 U.S.C. 78o(d).

16 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. We are proposing amendments to our rules to reflect the new, higher thresholds provided by the JOBS Act in our rules and to implement the required safe harbor for securities received pursuant to employee compensation plans.

17 Pub. L. No. 112-106, Sec. 501, 126 Stat. 326 (Apr. 5, 2012).

18 Pub. L. No. 112-106, Sec. 601, 126 Stat. 326 (Apr. 5, 2012).

Section 2 of the Bank Holding Company Act of 1956,[19] 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 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 2,000 or more persons. Section 601 of the JOBS Act also amended Exchange Act Section 12(g)(4) and Exchange Act Section 15(d)(1)[20] 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. 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.

Section 502 of the JOBS Act[21] amended Exchange Act Section 12(g)(5)[22] 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.[23] Section 503 of the JOBS Act[24] instructed the Commission to revise the definition of "held of record" pursuant to Exchange Act Section 12(g)(5) to implement the amendment made by Section 502 of the JOBS Act, and to create a safe harbor for issuers when determining

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19 12 U.S.C. 1841.

20 15 U.S.C. 78o(d)(1).

21 Pub. L. No. 112-106, Sec. 502, 126 Stat. 326 (Apr. 5, 2012).

22 15 U.S.C. 78l(g)(5).

23 15 U.S.C. 77e.

24 Pub. L. No. 112-106, Sec. 503, 126 Stat. 326 (Apr. 5, 2012).

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.

We believe that the increased registration threshold established by the JOBS Act is intended to permit issuers to defer Exchange Act registration until issuers have a larger shareholder base. In connection with the amendments made by Title V and Title VI of the JOBS Act, we are proposing to amend our rules to reflect the new, higher registration, termination of registration and suspension of reporting thresholds under revised Exchange Act Sections 12(g)(1), 12(g)(4) and 15(d)(1). We also are proposing to permit savings and loan holding companies to register, terminate registration and suspend reporting using the same thresholds that apply to banks and bank holding companies. Finally, we are proposing to amend Exchange Act Rule 12g5-1 to reflect the amendment to Exchange Act Section 12(g)(5) and 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 calculating the number of the issuer's holders of record when determining whether they are required to register under Exchange Act Section 12(g)(1).

After enactment of the JOBS Act, we sought comment from the public prior to the issuance of a proposing release. We have considered the pre-proposal comment letters received to date on Title V and Title VI of the JOBS Act, and we are requesting comment on various issues relating specifically to the proposed amendments.[25] In this release, we

[25] To facilitate public input on JOBS Act rulemaking before the issuance of rule proposals, the Commission invited members of the public to make their views known on various JOBS Act

are proposing rule amendments to implement and address issues specifically related to Title V and Title VI of the JOBS Act. We recognize that commenters have urged us to consider and propose additional amendments. For example, several commenters have recommended that the Commission make rule revisions related to the use of the term "accredited investor" or permitting other issuers to register, terminate registration and suspend reporting using the same thresholds that apply to banks and bank holding companies. [26] We have considered the suggestions made by these commenters, but at this time we are not proposing amendments that extend substantially beyond reflecting the new statutory requirements.

II. PROPOSED AMENDMENTS RELATING TO EXCHANGE ACT REPORTING THRESHOLDS

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

As a result of the JOBS Act changes to Exchange Act Sections 12(g)(1), 12(g)(4) and 15(d), we are proposing changes to Exchange Act Rules 12g-1, 12g-2, 12g-3, 12g-4 and 12h-3, which are 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 currently reflect the prior holder of record statutory

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initiatives in advance of any rulemaking by submitting comment letters to the Commission's website at http://www.sec.gov/spotlight/jobsactcomments.shtml. Comment letters received to date 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.

[26] See Section II.C. relating to the term "accredited investor." See also letters from Wilmer Hale (June 25, 2012), and Ledgewood, P.C. (Sept. 12, 2012) on behalf of their respective clients, a real estate investment trust and a real estate limited partnership, requesting that the Commission use its exemptive authority to revise the holder of record threshold to treat non-bank issuers similarly to banks and bank holding companies.

thresholds in Sections 12(g) and 15(d). We are proposing to amend these rules to reflect the new thresholds set forth in the JOBS Act.

Exchange Act Rule 12g-1 currently provides that an issuer shall be exempt from the registration requirements if, on the last day of its most recent fiscal year, it had total assets not exceeding $10 million. JOBS Act Section 501 amended Section 12(g)(1) to expressly include the $10 million asset threshold. We are proposing 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. The revision would additionally remove an outdated reference currently contained in the rule.[27]

As noted above, Section 601 of the JOBS Act amended Exchange Act Section 12(g)(4) to raise the threshold at which an issuer that is a bank or a bank holding company may terminate registration of a class of equity securities from 300 to 1,200 holders of record. Section 601 similarly amended Exchange Act Section 15(d)(1) by providing for an automatic suspension of the duty to file reports for a bank or bank holding company with respect to a class of equity security that is held of record by less than 1,200 persons at the beginning of its fiscal year, provided that the bank or bank holding company did not have a Securities Act registration statement that became effective during that year.

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[27] Under Exchange Act Rule 12g-1, foreign private issuers may not rely on the exemption from registration provided in that rule if their securities are quoted on an automated inter-dealer quotation system. The NASDAQ Stock Market was the only automated inter-dealer quotation system in existence when this provision was adopted and has subsequently 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)]. As a result, the reference to an automated inter-dealer quotation system is no longer necessary and we are proposing to remove it.

As currently in effect, Exchange Act Rules 12g-2 and 12g-3 reflect the holders of record thresholds in the Exchange Act for terminating registration and suspending reporting that existed prior to the JOBS Act amendments and not the new thresholds for banks and bank holding companies. Specifically,

- Rule 12g-2 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)[28] and establishes a 300-person threshold for such a class of securities to be registered under Section 12(g).
- Rule 12g-3 addresses the 300-person threshold for the registration of securities of successor issuers under Section 12(b) or Section 12(g).

In addition, although the statutory provisions of Exchange Act Section 12(g) and 15(d) do not suspend reporting obligations immediately when an issuer reaches the designated threshold, Exchange Act Rules 12g-4 and 12h-3 permit issuers to immediately suspend their duty to file periodic and current reports. These rules, however, reflect the thresholds in Sections 12(g) and 15(d) prior to the JOBS Act amendments and not the new threshold for banks and bank holding companies. Specifically,

- 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[29] that the class of securities is held by less than 300 persons, or 500 persons where the total assets of the

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[28] Section 12(g)(2)(A) [15 U.S.C. 78l(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. 78l(b)]. Section 12(g)(2)(B) [15 U.S.C. 78l(g)(2)(B)] provides an exemption for securities issued by registered investment companies.

[29] 17 CFR 249.323.

issuer have not exceeded $10 million on the last day of each of the preceding three years.

- Rule 12g-4(b) provides that the duty to file current and periodic reports under Exchange Act Section 13(a)[30] for that class of securities is suspended immediately upon the filing of a certification on Form 15 provided that the issuer has less than 300 holders of record, or 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.
- 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 less than 300 holders of record or 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;
  - 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

[30] 15 U.S.C. 78m(a).

- a registration statement has not become effective or was required to be updated pursuant to Exchange Act Section 10(a)(3)[31] during the fiscal year.[32]

Because the new statutory threshold for banks and bank holding companies is not reflected in Rule 12g-4, banks and bank holding companies seeking to rely on the new 1,200-holder threshold may not rely on the existing procedural accommodations in the rule. As a result, the statute requires them to 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) rather than being able to suspend their Section 13(a) reporting obligations immediately upon the filing of a Form 15 in reliance on the rule. Similarly, banks and bank holding companies are not permitted to 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 that they may use the higher thresholds only when seeking to suspend a Section 15(d) obligation on the first day of a fiscal year. Similarly the new statutory threshold also is not reflected in current Rules 12g-2 and 12g-3, leaving all issuers to refer to the lower 300-holder threshold under these rules.

We are proposing to amend these rules to include the JOBS Act thresholds for banks and bank holding companies.[33] The proposed changes would allow banks and

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31 15 U.S.C. 78j(a)(3).

32 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.

33 One commenter expressed support for a change permitting banks and bank holding companies to immediately suspend Section 13(a) reporting at the 1,200-holder threshold upon filing Form 15, as is permitted for all issuers under current rules at the 300-holder threshold. See letter from John Marshall Bank (Apr. 13, 2012).

bank holding companies to rely on the Commission's rules to suspend reporting immediately, to avoid being deemed registered upon the termination of certain exemptions or as a successor issuer, and to terminate their registration during the fiscal year, at the higher 1,200-holder threshold.

B. Increased Thresholds for Savings and Loan Holding Companies' Registration and Reporting Obligations

We are proposing to apply the same thresholds to savings and loan holding companies that apply to banks and bank holding companies. As noted above, banks and bank holding companies under Title VI of the JOBS Act are subject to a higher shareholder registration threshold for a class of equity security under Section 12(g)(1) of the Exchange Act, and a higher threshold for termination of registration under Section 12(g)(4) and for suspension of the duty to file reports under Section 15(d)(1). Section 3(a)(6) of the Exchange Act defines the term "bank";[34] however, neither the Exchange Act nor the Commission's rules define "bank holding company." Section 2 of the Bank Holding Company Act of 1956 specifically excludes "savings and loan holding companies" from the definition of bank holding company.[35] Thus, while banks, savings associations and bank holding companies are covered by Title VI of the JOBS Act, savings and loan holding companies are not.

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[34] 15 U.S.C. 78c(a)(6). Exchange Act Section 3(a)(6) defines a "bank" to include Federal savings associations and any other banking institution or savings association, as defined in the Home Owners' Loan Act. We read this definition to include savings and loan associations and other similar entities.

[35] A savings and loan holding company is a company that controls savings associations or other savings and loan holding companies, similar to the way a bank holding company is a company that controls banks or other bank holding companies. Savings associations and banks are all depository institutions, and each one is regulated by the appropriate Federal banking agency. 12 U.S.C. 1813(q). The definition of "appropriate Federal banking agency" provides which federal banking agency is the primary regulator for the various types of national, state and foreign banks and savings associations.

A commenter representing community banks asserted that savings and loan holding companies should be covered by Title VI of the JOBS Act.[36] Other commenters from the banking industry and Congress have also requested that savings and loan holding companies be treated similarly to bank holding companies for purposes of the registration, termination of registration and suspension of reporting provisions of the Exchange Act.[37] One commenter acknowledged that the JOBS Act did not "expressly extend its new threshold for termination of registration to savings and loan holding companies," but suggested that correction of that omission would be "entirely consistent with the intent and purpose of the JOBS Act."[38]

Based on a review of reporting issuers, we estimate that approximately 125 savings and loan holding companies were reporting issuers as of June 30, 2014, most of which are registered pursuant to Section 12(b).[39] Approximately 90 of these companies reported fewer than 1,200 holders of record and would be eligible to terminate registration under the proposed threshold.[40] These savings and loan holding companies,

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36 See letter from Independent Community Bankers of America (Apr. 16, 2012).

37 See, e.g., letters from American Bankers Association (Aug. 10, 2012); Community Bankers Association of Illinois (May 7, 2012); U.S. Representatives Himes and Womack (Nov. 29, 2012); Wayne Savings Community Bank (Apr. 12, 2012); U.S. Representative Stivers (May 4, 2012); and U.S. Representative Gibbs (Dec. 19, 2012).

38 See letter from American Bankers Association.

39 Savings and loan holding companies were identified by examining filings in the relevant Standard Industrial Classification codes.

40 The Board of Governors of the Federal Reserve System (the "Board of Governors") previously determined to exempt commercial savings and loan holding companies from its initial requirement that savings and loan holding companies generally submit the same reports as other banking entities regulated by the Board of Governors. See Agency Information Collection Activities Regarding Savings and Loan Holding Companies: Announcement of Board Approval Under Delegated Authority and Submission to OMB, (Dec. 23, 2011) [76 FR 81933 (Dec. 29, 2011)]. There are six commercial savings and loan holding companies that are all exchange-listed issuers obligated to file, and would continue to be obligated to file, Exchange Act reports pursuant to Exchange Act Section 12(b) (15 U.S.C. 78l(b)). For ease of application and due to the limited effect on, and small number of, such issuers, we are not proposing to differentiate between

however, are subject to regulation by the Board of Governors and are generally required to submit the same reports to banking regulators as other banking entities regulated by the Board of Governors, including banks and bank holding companies covered by Title VI of the JOBS Act.[41]

As noted above, the increased thresholds provided by the JOBS Act for registration, termination of registration and suspension of reporting for banks and bank holding companies do not apply to savings and loan holding companies. This creates inconsistent treatment among depository institutions, resulting in different registration requirements for savings and loan holding companies that otherwise provide services similar to those provided by banks and bank holding companies and are generally subject to similar bank regulatory and supervision requirements. We have received comments in support of treating savings and loan holding companies the same as banks and bank holding companies with regard to the increased thresholds.

We are proposing to revise our rules so that savings and loan holding companies are treated in a similar manner to banks and bank holding companies for the purposes of registration, termination of registration or suspension of their Exchange Act reporting

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commercial saving and loan holding companies and other savings and loan holding companies for purposes of this rulemaking.

41 See id. Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, 124 Stat. 1376) (the "Dodd-Frank Act") abolished the Office of Thrift Supervision, the regulator that formerly supervised savings and loan holding companies, and transferred its authorities (including rulemaking) related to savings and loan holding companies to the Board of Governors. The Board of Governors assumed supervisory responsibility for savings and loan holding companies and their non-depository subsidiaries beginning on July 21, 2011. The Board of Governors 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. These reports include, among others, quarterly Consolidated Financial Statements for Bank Holding Companies (FR Y-9C) and an Annual Report of Bank Holding Companies (FR Y-6).

obligations. Unlike for bank holding companies, which are able to rely on the JOBS Act statutory changes, the revised rules would be the sole basis on which savings and loan holding companies could rely when making those determinations. We are proposing to apply the new higher thresholds applicable to banks and bank holding companies to savings and loan holding companies[42] because we believe the regulatory oversight applicable to savings and loan holding companies is substantially similar to the regulatory oversight for bank holding companies. We believe these companies should be treated consistently with other depository institutions under our rules. We are therefore proposing to amend Exchange Act Rule 12g-1 to establish an exemption for savings and loan holding companies from the registration requirement that mirrors the exemption for banks and bank holding companies established by the JOBS Act. In addition, we are proposing to revise Exchange Act Rules 12g-2, 12g-3, 12g-4 and 12h-3 to permit savings and loan holding companies to immediately suspend current and periodic reporting upon filing Form 15 at the 1,200-holder threshold in the same manner as banks and bank holding companies.

C. 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 security (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).[43] A number of

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[42] Under our proposal "savings and loan holding company" would be defined pursuant to Section 10 of the Home Owners' Loan Act. 12 U.S.C. 1461.

[43] 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

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. Some commenters recommended that the Commission confirm that the term "accredited investor" as used in this provision of the JOBS Act has the same meaning as set forth in Securities Act Rule 501(a)[44] of Regulation D.[45] One commenter further recommended that the Commission permit an issuer to rely on an annual affirmation from investors that their accredited investor status has not changed.[46] Other commenters recommended that the Commission provide guidance or a safe harbor to allow issuers to rely on an ongoing basis on information previously obtained about a shareholder's accredited investor status.[47] Commenters also recommended that the Commission provide additional flexibility by, for example, permitting issuers to rely on the determinations made by certain third

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obligation under the Exchange Act, issuers that have filed a Securities Act registration statement that became effective but have not triggered an Exchange Act Section 12(g) registration requirement and issuers that have terminated registration or suspended their reporting obligation will need to monitor the accredited investor status of their investors as of the last day of each fiscal year.

44 17 CFR 230.501(a).

45 See letters from New York City Bar Association (June 6, 2012) ("NYCBA") and the Business Law Section of the American Bar Association (June 26, 2013) ("ABA"). The ABA letter further requested that the Commission provide guidance on the type of information upon which issuers may rely and specifically recommended that the Commission not require issuers to take reasonable steps to verify accredited investor status.

46 See letter from ABA.

47 See letters from Foley & Lardner (May 24, 2012) and NYCBA. Foley & Lardner recommended allowing reliance on information obtained at the time the issuer's securities were initially issued, or, in the alternative, when the securities were most recently issued, when making the determination of whether the holders are accredited for purposes of counting holders under Section 12(g). NYCBA recommended that the Commission expressly permit an issuer "to rely on any determination of 'accredited investor' status made in connection with the issuer's most recent sale of securities to the relevant investor, or the most recent transfer to the investor in connection with which the issuer actually determined that the investor was 'accredited.'" Other commenters also supported permitting issuers to rely on information previously provided if an investor fails to provide the issuer with updated information. See letters from ABA and Keith Paul Bishop (June 13, 2012).

parties, such as financial intermediaries, or permitting determinations during a reasonable period before or after the fiscal year end.[48]

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. We are not proposing to establish a new definition of "accredited investor" for the purposes of Section 12(g)(1). Securities Act Rule 501(a) contains a definition of "accredited investor" that includes any person who comes within, or who the issuer reasonably believes comes within, any of eight enumerated categories.[49] Section 413(b) of the Dodd-Frank Act specifically requires the Commission to undertake a review of the "accredited investor" definition in its entirety, as it relates to natural persons, every four years and no earlier than July 10, 2014.[50]

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48 See letter from ABA. ABA suggested that the rule should provide some flexibility on the timing of the determination. This would permit issuers to rely on information available to them at the time they made a judgment regarding accredited investor status, rather than requiring issuers to update the information as of the end of the fiscal year. See also letter from NYCBA recommending that the Commission adopt rules open to the possibility that limited access trading venues may be able to treat all participants as accredited investors. One commenter recommended that the Commission require issuers to determine accredited investor status as of the last day of each fiscal year. See letter from Keith Paul Bishop.

49 Under Securities Act Rule 501(a) the categories of accredited investor include: a bank, insurance company, registered investment company, business development company, or small business investment company; an employee benefit plan (within the meaning of the Employee Retirement Income Security Act) if a bank, insurance company, or registered investment adviser makes the investment decisions, or if the plan has total assets in excess of $5 million; a tax exempt charitable organization, corporation or partnership with assets in excess of $5 million; a director, executive officer, or general partner of the company selling the securities; an enterprise in which all the equity owners are accredited investors; an individual with a net worth of at least $1 million, not including the value of his or her primary residence; an individual with income exceeding $200,000 in each of the two most recent calendar years or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year; and a trust with assets of at least $5 million, not formed only to acquire the securities offered, and whose purchases are directed by a person who meets the legal standard of having sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment.

50 We have already requested comment on this definition. See Amendments to Regulation D, Form D and Rule 156, Release No. 33-9416 (Jul. 10, 2013) [78 FR 44806 (Jul. 24, 2013)].

We are proposing that the definition of "accredited investor" in Securities Act Rule 501(a) apply in making determinations under Exchange Act Section 12(g)(1).[51] The "accredited investor" determination would be made as of the last day of the fiscal year rather than at the time of the sale of the securities.[52] Issuers conducting offerings in reliance on an exemption from Securities Act registration in which purchasers must be accredited investors typically take appropriate steps to establish a reasonable belief that a prospective investor is an accredited investor. This reasonable belief is based on an issuer's due diligence and depends on the particular facts and circumstances surrounding the determination. We believe 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.

After an issuer completes its offering and has sold securities to purchasers who have been determined to be accredited investors, it is not required to periodically assess an investor's continued status as an accredited investor. We recognize that issuers may have difficulty determining whether existing security holders are accredited investors for purposes of the threshold in Section 12(g)(1) and that providing a safe harbor or other guidance could help to mitigate costs for issuers seeking to determine accredited investor status. Some commenters have suggested that we permit issuers to rely on information previously provided by these security holders in connection with the purchase or transfer

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51 Although the term "accredited investor" is also defined in Securities Act Rule 215 [17 CFR 230.215] for the purpose of the statutory exemption from registration under Section 4(a)(5) [15 U.S.C. 78d(a)(5)], the definition of "accredited investor" contained in Securities Act Rule 501(a) of Regulation D is the more commonly understood meaning of the term, given the prevalence of the use of Regulation D for exempt offerings.

52 Securities Act Rule 501(a) otherwise defines "accredited investor" as being determined at the time of the sale of the securities.

of securities for an indefinite period into the future.[53] We believe such reliance could, however, result in the use of outdated information that may no longer be reliable. Instead, an issuer will need to determine, based on facts and circumstances, whether it can rely upon prior information to form a reasonable basis for believing that the security holder continues to be an accredited investor as of the last day of the fiscal year.

Without new guidance from the Commission, when making the determination at fiscal year-end of whether a security holder is an accredited investor for purposes of Exchange Act Section 12(g)(1), issuers would likely use procedures similar to those used when relying on Rule 506.[54] We recognize that the accredited investor determination under the Securities Act is made in the context of an investor making an investment decision, while in the Exchange Act context it is made when an issuer is considering whether it must register a class of securities with the Commission. In light of this, we are considering whether a different approach would be appropriate for determining accredited investor status under Section 12(g) and solicit comment on the appropriate structure and criteria for such an approach below.

Request for Comment

1. We are proposing to revise Rule 12g-1 to reflect changes made by Titles V and VI of the JOBS Act. Should we include the requirements of Section 12(g)(1) in our rules as proposed? Should we delete the provision in the current Rule 12g-1 that precludes

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53 See supra note 47.

54 The procedures used in a Rule 506 offering may vary depending on a number of factors, including the nature of the purchaser and whether the offering is pursuant to Rule 506(b) or Rule 506(c). Rule 506(c) requires an issuer to take reasonable steps to verify that purchasers of securities sold in such offering are accredited investors. As we previously recognized when we adopted Rule 506(c), "issuers may have to apply a stricter and more costly process to determine accredited investor status than what they currently use." See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9415 (Jul. 10, 2013) [78 FR 44771 (Jul. 24, 2013)].

foreign private issuers from relying on the exemption from registration if their securities are quoted on an automated inter-dealer quotation system, as proposed?

2. The higher registration and reporting thresholds could result in issuers having a significant number of shareholders with freely tradable shares who lack current disclosure information about the issuer. How would investors get the information they need in connection with purchases and sales? What investor protection issues are raised when these security holders engage in secondary market transactions and how might they be addressed?

3. Should we extend the new registration, termination of registration and suspension of reporting thresholds for banks and bank holding companies to savings and loan holding companies, as proposed? We are proposing to use the definition of "savings and loan holding company" as defined in Section 10 of the Home Owners' Loan Act. Does the proposed definition cover the appropriate entities? If not, what definition should be used?

4. We are proposing to permit savings and loan holding companies to use the higher thresholds equivalent to those available to banks and bank holding companies. Are there facts and circumstances, other than those discussed above, that we should consider in evaluating whether to provide those higher thresholds? How would using different thresholds for savings and loan holding companies impact market participants and investors? What effect would different thresholds have on competition between savings and loan holding companies and other depository institutions, such as banks and bank holding companies?

5. The population of savings and loan holding companies includes commercial savings and loan holding companies that the Board of Governors exempted from its

initial requirement that savings and loan holding companies generally submit the same reports as other banking entities regulated by the Board of Governors.[55] These commercial savings and loan holding companies are all exchange-listed issuers that are currently registered and required to file reports under Section 12(b) of the Exchange Act. Should these companies be permitted to rely on the higher thresholds applicable to banks and bank holding companies? Should we instead carve out such savings and loan holding companies or provide other limitations for these companies?

6. Some commenters have recommended that we provide a safe harbor or other guidance to provide issuers with more certainty on how to establish a reasonable belief that a security holder is an accredited investor and therefore qualifies under the definition. Are there circumstances in the determination required to be made under Section 12(g) that suggest the need for a safe harbor or guidance, and if so, is one preferable over the other? What should be the parameters of any safe harbor or guidance? Should a safe harbor or other guidance specify the methods of inquiry an issuer could make or the documents it should obtain that would establish a reasonable belief? What methods or standards should we adopt and what steps should we require in making the determination? What negative effects on investors, if any, could result from providing a safe harbor or other guidance? Absent a safe harbor or other guidance, what burdens would the issuer face in establishing reasonable belief that a security holder is an accredited investor and in making the determination as to whether it has exceeded the Section 12(g) thresholds for Exchange Act reporting? Please quantify, if possible, the

[55] See supra note 40.

expected costs of establishing a reasonable belief every year for each accredited investor and compare the expected costs to the estimated costs of registration.

7. If the rules were to include a safe harbor or other guidance, should we permit an issuer to form its reasonable belief that a person is an accredited investor based on determinations made by specified third parties? For example, in Securities Act Rule 506(c)(2)(ii)(C) we allow issuers to rely on a written confirmation by a registered broker-dealer, a registered investment adviser, a licensed attorney, or a certified public accountant to satisfy the requirement that the issuer take reasonable steps to verify the accredited investor status of a purchaser. Should a similar written confirmation be sufficient here? Should we permit written confirmations from other third parties not subject to regulatory oversight? Why or why not? If we permit written confirmations from third parties that are not subject to regulatory oversight such as those found in Rule 506(c)(2)(ii)(C), should we require issuers to perform some level of due diligence on the accredited investor determinations made by those third parties or on the third parties making those determinations? Would the answer depend on the nature of the third party? Alternatively, should we permit an issuer to rely on a written certification by the investor, on other specified information obtained by the issuer, or on a combination of a certification and other information? What information, other than a written investor certification, would it be appropriate to require? Would the answer depend on whether an issuer had determined at the time of the initial investment that the investor was an accredited investor? For what period of time should that determination be considered reliable? Should the safe harbor or other guidance specify that determinations made a specified period before or after the fiscal year end would be deemed to be reasonable? If

so, what would be a reasonable time period for making such determination? What documentation, if any, should be retained by the issuer?

8. For purposes of any safe harbor or other guidance, should we permit an issuer to rely on previously obtained information relating to the person's accredited investor status, such as information obtained at the time the issuer's securities were initially, or most recently, sold to that person? Should such a provision be limited to situations in which the issuer does not have information that would lead it to believe that the previously obtained information was incorrect, unreliable or had changed? Should we place a time limit on the permitted use of previously obtained information, such as only permitting the use of information received within the preceding six months or year? Should an issuer be able to rely on information previously obtained if the security holder failed to respond to an issuer's request for an annual affirmation of accredited investor status?

III. PROPOSED 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 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.[56] The provision, which is substantially broader than the Commission's current rules exempting compensatory employee stock options from Section 12(g) registration,[57] 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 exempt transactions. We are proposing to amend Exchange Act Rule 12g5-1 to implement the statutory exclusion created by Section 502 of the JOBS Act and to establish a non-exclusive safe harbor for issuers as directed by Section 503.[58]

Subsequent to the adoption of the JOBS Act, a number of commenters provided recommendations to the Commission as to how "employee compensation plan" should be defined. Some commenters recommended that the Commission interpret the term broadly to promote the use of employee equity issuances.[59] One commenter indicated that "linking the scope of Rule 701 and amended Section 12(g)(5) makes sense, in light

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56 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.

57 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 a similar exemption for stock options for reporting issuers that are required to file such periodic reports. 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)] (the "Compensatory Stock Options Release").

58 See Proposed Rule 12g5-1(a)(7).

59 See letter from Foley & Lardner recommending a broad definition of "employee compensation plan" that would include arrangements that are not written. See also letter from Keith Paul Bishop recommending a broad definition of "employee compensation plan."

of the apparent purpose of the latter provisions, and will avoid needless complexity."[60] Another commenter recommended that the Commission establish a non-exclusive safe harbor without recommending a specific definition for "employee compensation plan."[61] This commenter suggested that "application in a Section 12(g) context of the familiar concepts applied in connection with the exempt issuance of compensatory equity securities under Rule 701 will facilitate compliance by streamlining a smaller issuer's learning curve and simplifying recordkeeping."[62] In addition, this commenter specifically recommended that the safe harbor "explicitly import the interpretation of Rule 701(c)" in order to incorporate "the full range of compensatory arrangements and security holders described in Rule 701(c) under the Securities Act" and that it "should cover equity securities in the hands of the full range of participants and permitted transferees enumerated in Rule 701(c)."[63] This commenter also indicated that "the requirement of a written arrangement is reasonable in the Section 12(g)(5) context, as well as for Rule 701."[64] Commenters also made specific recommendations regarding additional securities that should be considered "securities received pursuant to an employee compensation plan."[65]

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60 See letter from NYCBA. For a more detailed explanation of Securities Act Rule 701, see infra notes 66 and 72.

61 See letter from ABA. ABA indicated that "it is important that the concept of 'employee compensation plan' encompass both traditional plans and individual compensatory agreements and include compensatory arrangements established by the various entities related to the issuer enumerated in Rule 701(c)."

62 See id.

63 See id.

64 See id., indicating that state corporate law generally requires some documentation of authorized issuances of equity securities. This recommendation contrasts with recommendations of other commenters suggesting that the term "employee compensation plan" should not be read to require a written arrangement. See supra note 59.

65 See, e.g., letter from David C. Fisher (June 13, 2012), recommending that "securities acquired in an issuer-sponsored internal market, limited to transactions in securities received pursuant to the

Instead of creating a new definition for the term "employee compensation plan," we are proposing to revise the definition of "held of record" and 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).[66] Although some commenters recommended that we create a new, broad definition, we believe that by not defining the term "employee compensation plan," and by providing for a non-exclusive safe harbor, we are providing issuers with flexibility in their determination under Section 12(g)(5). We concur with some commenters who recommended applying the Rule 701 concepts that issuers already employ for exempt issuances, and propose to use those concepts as part of the non-exclusive safe harbor. We further believe that developing a new definition for "employee compensation plan" at this time potentially could result in needless complexity and create conflicts with the current definitions of "compensatory benefit plan" and "employee benefit plan," which the Commission has sought to harmonize.[67]

By conditioning the new exclusion from "held of record" upon the securities being received pursuant to an employee compensation plan in 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

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issuer's employee compensation plans, will be considered securities received pursuant to an employee compensation plan." See also letter from NYCBA suggesting that "'closed system' platforms and trading venues" may be able to afford issuers a reasonable basis to determine that participants are excludable employees.

66 In 1988, the Commission adopted Securities Act Rule 701 [17 CFR 230.701] to provide an exemption from Securities Act registration for offers and sales of securities made pursuant to compensatory benefit plans by issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act. See Compensatory Benefit Plans and Contracts, Release No. 33-6768 (Apr. 14, 1988) [53 FR 12918 (Apr. 20, 1988)] (the "Rule 701 Adopting Release").

67 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").

from its determination of the number of holders of record under Section 12(g)(1) of the Exchange Act. Given this express interaction between Securities Act and Exchange Act concepts in this provision of the JOBS Act, we believe that it would facilitate compliance if the terminology we use in proposed Exchange Act Rule 12g5-1(a)(7) is consistent with the terminology used in our Securities Act rules.

In regulating securities offerings to employees, we use the term "employee benefit plan," as defined in Securities Act Rule 405,[68] for Securities Act Form S-8 registration,[69] but use the term "compensatory benefit plan" in the Securities Act Rule 701 exemption. A "compensatory benefit plan" under Rule 701(c)(2) is broadly defined as "any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan."[70] When adopting Rule 701, the Commission expressly stated that it patterned the definition of "compensatory benefit plan" on the definition used in Securities Act Rule 405.[71] Rule 701 includes a number of conditions consistent with the Rule 405 definition of "employee benefit plan." In particular, Rule 701(c) limits the exemption to offers and sales of securities under a written compensatory

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68 Securities Act Rule 405 defines an "employee benefit plan" as any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors. However, consultants or advisors may participate in an employee benefit plan only if: (1) They are natural persons; (2) They provide bona fide services to the registrant; and (3) 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.

69 The Commission permits issuers that are subject to Exchange Act reporting requirements to register the offer and sale of securities to employees pursuant to employee benefit plans on Form S-8. This form provides for abbreviated disclosure and automatic effectiveness upon filing. See Adoption of Form S-8, Release No. 33-3480 (June 16, 1953) [18 FR 3688 (June 27, 1953)]. See also Registration and Reporting Requirements for Employee Benefit Plans, Release No. 33-6867 (June 6, 1990) [55 FR 23909 (June 13, 1990)] (the "1990 Form S-8 Release")

70 17 CFR 230.701(c)(2).

71 See the Rule 701 Adopting Release.

benefit plan established by the issuer for the participation of its employees and other specified persons.[72] Many of the conditions applicable to exempt offers and sales made under Rule 701 are also similar to conditions placed on Form S-8 registration of securities to be offered under an "employee benefit plan" as defined in Rule 405. For example, Rule 701(c)(3) defines eligible family members consistent with Form S-8.[73] In addition, the Rule 701 exemption includes a number of conditions to its use, including but not limited to conditions that the plan be written and delivered to employees; that the plan be 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,

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[72] Securities Act Rule 701(c) exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii)) under a written compensatory benefit plan (or written 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.

[73] Form S-8 and Rule 701 are 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. See the 1999 Form S-8 Release at Section III and the 1999 Rule 701 Release at Section II.E. 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.

directors, general partners, trustees, officers, or consultants and advisors; [74] and that the amount of securities sold be limited.

B. Definition of "Held of Record" and Non-exclusive Safe Harbor for Determining Holders of Record

As directed by Section 503 of the JOBS Act, the Commission is proposing to amend the definition of "held of record" and 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)(A).[75] We received comments addressing issues about the scope of the safe harbor. One commenter recommended that the Commission expressly provide that the safe harbor is a non-exclusive safe harbor akin to the Securities Act Rule 506 safe harbor under Securities Act Section 4(a)(2).[76] This commenter also recommended that a safe harbor should provide that in a "subsequent transaction (including a business combination) that is exempt from,

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74 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."

75 As proposed, this amendment would not affect the definition of "held of record" when determining the number of holders for the purposes of termination of registration or suspension of reporting or with regard to the number of holders reported pursuant to Item 201(b) of Regulation S-K (17 CFR 229.201(b)).

76 See letter from ABA 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."

or otherwise is not subject to, the registration requirements of Section 5, the securities issued in that transaction 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" would also be covered.[77] The same commenter further recommended that securities issued in unregistered transactions based on the "no sale" theory should be included within the definition of "transactions exempt from section 5."[78]

1. Definition of "Held of Record"

We are proposing 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 or 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 Exchange Act Rule 701(c) who received the securities in a transaction exempt from the

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77 See id.

78 See id. 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 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).

registration requirements of Section 5 of the Securities Act in exchange for securities excludable under proposed Rule 12g5-1(a)(7).

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 do not trigger the registration requirement of Securities Act Section 5, which applies only to the offer and sale of securities. 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 are therefore proposing 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.

As proposed, the rule would also permit an issuer to exclude 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.[79] The proposed exclusion is 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

[79] See supra note 72 and 73 and infra note 82 (describing the types of persons eligible to receive securities under Rule 701(c)).

record," the securities issued in the exchange also would not be counted under this definition.[80] 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 believe 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. Non-exclusive Safe Harbor for Determining Holders of Record

We are proposing a non-exclusive safe harbor under proposed Rule 12g5-1(a)(7) that would provide that a person will be deemed to have received the securities pursuant to an employee compensation plan if such person received them pursuant to a compensatory benefit plan in transactions that met the conditions of Securities Act Rule 701(c).[81]

As proposed, an issuer would be able to rely on the safe harbor for 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), were not met. Thus, the safe harbor would be available for holders of securities received in other employee compensation plan transactions exempted from, or not subject

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[80] 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.

[81] As proposed, 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 proposed Rule 12g5-1(a)(7).

to, the registration requirements of Section 5 of the Securities Act, such as securities issued in reliance on Securities Act Section 4(a)(2), Regulation D of the Securities Act, or Regulation S of the Securities Act, that meet the conditions of Rule 701(c).

We believe that using the conditions of Rule 701(c) to structure the safe harbor for determining whether holders received their securities pursuant to an employee compensation plan in exempt transactions would allow issuers to apply well understood principles of an existing Securities Act exemption to the new Exchange Act registration determination under the JOBS Act. The safe harbor would be available for the plan participants enumerated in Rule 701(c), including employees, directors, general partners, trustees, officers and certain consultants and advisors.[82] The safe harbor also would be available for permitted family member transferees with respect to securities acquired by gift or domestic relations order, or securities acquired by them in connection with options transferred to them by the plan participant through gifts or domestic relations orders.[83] Because the safe harbor would be limited to holders who are persons specified in Rule 701(c) who received the securities under specified circumstances, once these persons

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82 A de facto employee would be considered an employee for purposes of proposed Rule 12g5-1(a)(7). For purposes of Rule 701, the scope of eligible consultants and advisors is the same as under Form S-8. See 1999 Rule 701 Release at Section II.D and 1999 Form S-8 Release at Section II.A.1. This also would be the case for purposes of proposed Rule 12g5-1(a)(7). We note that 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. However, the fact that securities would no longer be eligible for the exclusion under the safe harbor following their transfer should limit the potential for abuse. 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 proposed safe harbor.

83 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 would be 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.

subsequently transfer the securities, whether or not for value, the securities would need to 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).

In addition, under the proposed rules, foreign private issuers[84] would be able to rely on the safe harbor when making their determination of the number of U.S. resident holders under Exchange Act Rule 12g3-2(a).[85] Under Rule 12g3-2(a), foreign private issuers that meet the asset and shareholder threshold of 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. 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, subject to specific provisions relating to brokers, dealers, banks and nominees.[86] 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

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84 The definition of "foreign private issuer" is contained in 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.

85 17 CFR 240.12g3-2(a)

86 The proposed amendment to Rule 12g5-1 would be 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 proposed approach to Rule 12g3-2(a), we are proposing to amend 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, and thus for determining whether an issuer qualifies as a foreign private issuer. See the proposed amended instruction to paragraph (c)(1) of Rule 3b-4.

proposed changes to Rule 12g5-1 would 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.[87]

Request for Comment

9. Instead of leaving the term "employee compensation plan" undefined and providing a safe harbor for purposes of determining the number of holders of record under Section 12(g)(1), should we create a new definition for purposes of the determination? If a new definition would be preferable, please describe how "employee compensation plan" should be defined and explain why a definition would be preferable.

10. In some circumstances issuers may rely on a "no sale" theory under Section 2(a)(3) of the Securities Act to issue securities to employees. As proposed, securities held by persons who received those securities pursuant to an award to employees that did not involve a sale within the meaning of Securities Act Section 2(a)(3) would be excluded from the definition of "held of record" for purposes of determining an issuer's Exchange Act Section 12(g) registration obligations. Should these securities be excluded from the definition?

11. The exclusion from "held of record" in proposed Exchange Act Rule 12g5-1(a)(7)(i) for securities received pursuant to employee compensation plans would include within its scope holders of securities received pursuant to an employee compensation

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87 The definition of "foreign private issuer" under the Securities Act, which is found in Securities Act Rule 405 [17 CFR 230.405], is the same as the definition under Exchange Act Rule 3b-4. The definition of "foreign private issuer" under the Securities Act was last amended in Foreign Issuer Reporting Enhancements, Release No. 33-8959 (Sept. 23, 2008) [73 FR 58300 (Oct. 6, 2008)]. At that time, an instruction to paragraph (1) of the definition, which was the same as the Instruction to Paragraph (c)(1) of Rule 3b-4, was inadvertently omitted. We are proposing to amend the foreign private issuer definition under Rule 405 to reinsert the omitted instruction but with a proposed revision, identical to that proposed under 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.

plan in transactions that do not involve a sale within the meaning of Section 2(a)(3) or that are exempt from the registration requirements of Section 5. Further, the safe harbor proposed in Rule 12g5-1(a)(7)(ii) would be available to securities issued in those transactions as long as the person received the securities pursuant to a compensatory benefit plan in transactions that met the conditions of Securities Act Rule 701(c). Should the scope of the safe harbor be more limited, such as by restricting it to securities received pursuant to exempt transactions that meet all of the requirements of Securities Act Rule 701, the requirements of Regulation D or another specified subset of exemptions? If so, please explain why.

12. We are proposing a non-exclusive safe harbor that relies, in part, on existing Rule 701(c) to establish guidelines for an issuer to use when determining whether holders of their securities received them pursuant to an employee compensation plan. Does using existing Rule 701(c) provide sufficient guidance to issuers? Should we provide additional guidance for implementing the safe harbor? If so, please explain what additional guidance is needed.

13. For purposes of the safe harbor, should we limit the categories of persons who may receive securities pursuant to employee compensation plans? For example, our proposed safe harbor includes consultants and advisors because they qualify under Rule 701. Should they only be included if they are natural persons and meet the other Rule 701(c) conditions, as proposed? Alternatively, should consultants and advisors be excluded?

14. Should we, as proposed, permit securities held by family member transferees acquired by gift or domestic relations order, or securities acquired by them in connection with options transferred to them by the plan participant through gifts or domestic

relations orders to be excluded? If we modify the scope of the transferees or the type of securities, what modifications would be appropriate?

15. Exchange Act Rules 12h-1(f) and12h-1(g) exempt compensatory employee stock options from registration under Exchange Act Section 12(g) by exempting issuers from counting holders of stock options received pursuant to written compensatory stock option plans under specified conditions. [88] How does the exclusion provided by Section 502 of the JOBS Act and our proposals, including our proposal to exclude securities that do not involve a sale under Section 2(a)(3) of the Securities Act, affect the continuing need for these rules?[89] Should either Rule 12h-1(f) or Rule 12h-1(g) be rescinded in light of the amendments made by Section 502 of the JOBS Act and our proposals? Alternatively, are there any modifications needed to reflect the changes related to Section 502 and make the rules more useful?

16. Should we permit an issuer to exclude from the "held of record" determination securities issued to security holders in an exchange exempt from registration under the Securities Act where the securities surrendered by those holders in the exchange were received by them pursuant to a compensatory benefit plan that met the conditions of the proposed rule? As proposed, the exclusion would be limited to securities issued in an exchange exempt from Securities Act registration to persons eligible to receive securities pursuant to Rule 701(c) from the issuer, such as former employees who were employed by or providing services to the surviving issuer at the time the exchange securities were

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88 See Compensatory Stock Options Release, supra note 57.

89 See letter from ABA, which suggested that while Rule 12h-1(f) may no longer be necessary, Rule 12h-1(g) may have continuing applications. Specifically, there may be instances in which an issuer subject to an Exchange Act reporting requirement may issue to employees compensatory options that are part of a class of equity securities not registered under the Exchange Act.

offered. Should the Commission consider expanding the exclusion to securities received by other former employees in such an exempt exchange where the securities to be surrendered in the exchange were received pursuant to a compensatory benefit plan in transactions that met the conditions of the proposed rule? Would the possibility that an exempt exchange could cause a number of former employees previously counted as exempt from the "held of record" determination to be counted as holders of record immediately on consummation of the exchange inhibit companies from entering into these transactions?

17. Foreign private issuers are subject to different standards relating to when they are required to register a class of equity securities under the Exchange Act. Should the Commission permit foreign private issuers to exclude securities received pursuant to an "employee compensation plan" in transactions exempt from, or not subject to, the Securities Act registration requirements from the 300 U.S. holders threshold in Exchange Act Rule 12g3-2(a), as proposed? Should we instead require foreign private issuers to continue counting these securities when determining their number of U.S. holders? Should we further permit issuers to exclude such securities for purposes of assessing whether an issuer qualifies as a foreign private issuer or should such securities be included in this determination, as would be required under our proposed amendments to Securities Act Rule 405 and Exchange Act Rule 3b-4?

IV. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments regarding the proposed rule amendments, specific issues discussed in this release, and other matters that may have an effect on the proposed rules. We request comment from the point of view of issuers, investors and other market participants. We note that comments are of

particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits. If alternatives to the proposals are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as specific as possible.

Request for Comment

18. Are there other rules or forms that should be revised or updated as a result of the statutory changes made by Title V and Title VI of the JOBS Act? If so, please explain what revisions are needed?

19. The definition of "held of record" in Exchange Act Rule 12g5-1 requires an issuer, for the purposes of determining whether it is subject to the provisions of Section 12(g) or Section 15(d), to count as holders of record only persons identified as owners on records of security holders maintained by or on behalf of the issuer in accordance with accepted practice and subject to certain conditions. This rule simplifies an issuer's determination process by allowing it to look to security holders that appear in its records. Are there alternative definitions of "held of record" that would more appropriately address the purposes of Section 12(g)?[90]

V. 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

[90] In its consideration of the JOBS Act, Congress considered other definitions of "held of record" but ultimately did not define the term for purposes of the provisions of Section 12(g).

holding companies. The Commission is proposing rules to implement Title V and Title VI of the JOBS Act.

In proposing rules or amendments, we are mindful of the costs imposed by and the benefits obtained from our rules. The discussion below attempts to address the economic effects of the proposed amendments, including the likely costs and benefits of the amendments as well as the effect of the amendments on efficiency, competition and capital formation.[91] Some of the costs and benefits stem from the statutory mandates of Title V and Title VI, while others are affected by the discretion we exercise in revising our rules to reflect this mandate. These two types of costs and benefits may not be entirely separable to the extent our discretion is exercised to realize the benefits that we believe were intended by Title V and Title VI. We request comment on all aspects of the economic effects, such as the costs and benefits, of the amendments that we are proposing. We particularly appreciate comments that distinguish between the economic effects that are attributed to the statutory mandate itself and the economic effects that are the result of policy choices made by the Commission in implementing the statutory mandate.

A. Baseline

The baseline for our economic analysis of the proposed rules, including the baseline for our consideration of the effects on efficiency, competition and capital

[91] Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact on competition that the rules would have, 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.

formation, is the state of the market as well as market practices prior to the JOBS Act. Prior to the JOBS Act, issuers were required to register their equity securities with the Commission upon reaching 500 holders of record and total assets of $10 million, and were allowed to terminate registration or suspend the duty to file with the Commission when the number of holders of record had fallen below 300. However, 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), provided that persons holding certain employee compensation plan securities need not be counted when determining whether an issuer is required to register, and raised the thresholds at which banks and bank holding companies are permitted to terminate registration or suspend reporting obligations with the Commission. These statutory changes made by the JOBS Act went into effect as soon as the JOBS Act was signed into law. As a result of the JOBS Act, some banks and bank holding companies were newly eligible to terminate registration or suspend reporting, and as of June 30, 2014, we estimate that more than 90 have elected to do so.[92] We estimate that there are approximately 500 banks and bank holding companies that currently report to the Commission,[93] of which some may be eligible to terminate registration under the JOBS Act but have elected to continue

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92 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. Commission staff is continuing to monitor such filings.

93 The Commission staff derived this estimate by analyzing annual filings submitted to the Commission during calendar year 2013.

reporting. We are proposing to amend specified Exchange Act rules to reflect the new, higher threshold for banks and bank holding companies under Section 12(g)(4) and Section 15(d)(1). For those banks and bank holding companies that would be eligible to terminate registration under Section 12(g), the proposed rules set forth procedural accommodations that are available to other issuers under current rules to accelerate the process.

The proposed rules would also permit savings and loan holding companies to use the same, higher thresholds for registration, termination of registration and suspension of the reporting obligation that apply to banks and bank holding companies. There are approximately 125 savings and loan holding companies that currently report to the Commission.[94] As we explain in more detail below, we estimate that approximately 90 would be eligible to terminate registration or suspend reporting under the proposed rules.

In addition, the proposed rules would apply the definition of "accredited investor" in Securities Act Rule 501(a) in making determinations under Exchange Act Section 12(g)(1). Finally, the proposed rules would revise the definition of "held of record" and establish the scope of a non-exclusive safe harbor for issuers to rely on when determining whether securities were received pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act or did not involve a sale within the meaning of Section 2(a)(3) of the Securities Act. The proposed safe harbor would rely on the definition of "compensatory benefit plan" in Securities Act Rule 701 and the conditions in Securities Act Rule 701(c).

We considered alternative definitions of "employee compensation plan." We also

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[94] Id.

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 it could affect whether an issuer can remain a non-reporting issuer. 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 Proposed Rules

The proposal would affect registrants 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 proposed rules below.

Increased thresholds for banks and bank holding companies

The JOBS Act amended Sections 12(g) and 15(d) of the Exchange Act to raise the thresholds at which banks and bank holding companies may terminate registration or suspend their obligations to file reports with the Commission to 1,200 holders of record. These changes were effective immediately upon the enactment of the JOBS Act, and banks and bank holding companies may rely on the amended provisions to terminate registration or suspend their reporting obligations. However, under the statute, banks and bank holding companies that want to use the higher threshold 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. Our existing rules afford issuers with procedural

accommodations that let them suspend their reporting obligations immediately upon the filing of a certification on Form 15. To make these procedural accommodations applicable to banks and bank holding companies at the higher threshold, we are proposing to revise Exchange Act Rules 12g-2, 12g-3, 12g-4 and 12h-3 to reflect the 1,200 holders threshold for banks and bank holding companies, which would permit banks and bank holding companies to rely on the rules to cease reporting during a fiscal year, rather than wait the prescribed 90 days or until the end of the reporting year. This would reduce issuer compliance and reporting costs during the fiscal year the issuer ceased reporting, but would also accelerate the loss of investor access to current information about the issuer. The proposed changes also would harmonize the statutory and regulatory thresholds and lessen potential confusion that could arise from the differences in the thresholds contained in the statute and the existing rules.

We estimate that there are approximately 500 banks and bank holding companies that currently report with the Commission. Many of these reporting issuers have more than 1,200 holders of record and would not be eligible to cease reporting under the new thresholds. Out of that 500, 143 reporting banks and bank holding companies have between 300 and 1,200 holders of record and may be eligible to cease reporting, although 89 of them would have to give up a national exchange listing to do so. Because banks and bank holding companies remain subject to other regulatory reporting requirements,[95] it is possible that they would continue reporting even if they are eligible to cease reporting under the Exchange Act. We anticipate that banks and bank holding companies would weigh the benefits of being a public company against the burden of additional

[95] See supra note 41.

disclosure costs, in deciding whether to terminate registration or suspend their reporting obligation. Commonly cited benefits of being a public company 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.[96] Commonly cited costs of being a public company include the need to comply with increased regulations and regulatory supervision, including requirements for independent audits, disclosure of information to competitors, loss of control and ownership dilution.[97]

Permitting savings and loan holding companies to use the higher thresholds

We are proposing to apply the 2,000-holders of record threshold for registration to savings and loan holding companies in revised Exchange Act Rule 12g-1. We are also proposing to extend the increased thresholds established by Section 601 of the JOBS Act to savings and loan holding companies by specifically including them in revisions to Exchange Act Rules 12g-2, 12g-3, 12g-4 and 12h-3 that accommodate banks and bank holding companies at the higher 1,200 holders of record threshold for termination of

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96 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 IPOs 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).

97 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).

registration or suspension of the duty to file reports. As a result, savings and loan holding companies would be able to delay registration with the Commission until they reach the 2,000-holder threshold, and savings and loan holding companies with between 300 and 1,199 holders of record would be newly eligible to terminate or suspend their Exchange Act reporting obligations.

We estimate that approximately 125 savings and loan holding companies had a class of securities registered pursuant to the Exchange Act as of June 30, 2014; [98] of these approximately 100 are registered pursuant to Section 12(b). By analyzing the number of holders of record for these companies, the staff determined that approximately 90 of the 125 savings and loan holding companies would be eligible to terminate registration or suspend reporting. Most of the newly eligible companies would have to give up a national securities exchange listing to do so. Because delisting from a national securities exchange could severely impact the liquidity of traded securities, many of these savings and loan holding companies may be unwilling to suspend their reporting requirements even if such an action was available to them. We therefore do not expect many of these savings and loan holding companies to avail themselves of the extended provisions.

If we do not extend the provisions of Section 601 to savings and loan holding companies, there would be inconsistent treatment relative to banks and bank holding companies, resulting in different registration requirements and levels of disclosure for savings and loan holding companies that provide similar services and are generally subject to the same regulatory requirements. This could have an adverse impact on their ability to compete. Alternatively, savings and loan holding companies could seek to

[98] The Commission staff derived this estimate by analyzing annual filings submitted to the Commission.

become chartered as banks or bank holding companies and thereby incur associated costs; this could distort the competitive balance of products and services offered by these institutions.

Applying consistent treatment between savings and loan holding companies and banks and bank holding companies would lessen the likelihood of changes to the current competitive balance between these institutions. Moreover, the potential loss of information that would otherwise be made public through Exchange Act reporting if the provisions of Section 601 are extended to savings and loan holding companies would be mitigated because the savings and loan holding companies would continue to file reports with banking regulators.[99] As a result, extending the relief to savings and loan holding companies to provide consistent treatment relative to banks and bank holding companies may have a positive impact on the overall efficiency of markets served by the potentially affected institutions.

Definition and safe harbor for securities "held of record"

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). Section 503

[99] While the proposed rules should have effects on competition by ensuring that savings and loan holding companies are not put at a disadvantage relative to banks and bank holding companies, the termination of registration or suspension of reporting by savings and loan holding companies may lessen the information available to investors and adversely affect efficiency and capital formation by possibly increasing information asymmetries, monitoring costs, and cost of capital. However, the impact on efficiency and capital formation may be mitigated to the extent that the reports that savings and loan holding companies file with banking regulators contain information comparable to that mandated by the reporting requirements under the Exchange Act.

of the JOBS Act directs the Commission to adopt a safe harbor that issuers can use when making the holder of record determination. 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 could benefit issuers by allowing them to better control how and when they become subject to the reporting requirements, while continuing to use securities to compensate employees. 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, for these issuers, the potential registration of a class of securities and the associated reporting may be delayed, adversely impacting investors, including employees, who otherwise might benefit from the information provided through Exchange Act reporting requirements. As a result, the proposed rules regarding the definition of "held of record" and the scope of the safe harbor could have an impact on the potential costs and benefits to the affected issuers and their investors by affecting areas such as the ease of relying upon the statutory exemption, the number of non-reporting companies able to forestall registration, and the amount of information available to investors in those issuers.

Instead of establishing a new definition for the term "employee compensation plan," we are proposing to amend 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 the registration requirements of Section 5 of the Securities Act, or not involving a sale within the meaning of Section 2(a)(3) of the Securities Act. Proposing to exclude securities issued to employees in transactions

that do not involve a sale under Section 2(a)(3) from the definition of "held of record" for purposes of determining an issuer's obligation to register a class of securities under the Exchange Act would be beneficial to issuers who rely on the "no sale" theory when making compensatory grants to certain employees. Excluding such "no sale" securities could reduce the number of holders of record of an issuer and potentially delay required Exchange Act reporting.

We are also proposing to establish a non-exclusive safe harbor that relies on Securities Act Rule 701(c) and the definition of "compensatory benefit plan" in that rule to assist issuers in making the determination of whether holders of securities received pursuant to an employee compensation plan may be excluded. We believe that relying on an existing definition that is already understood by market participants would make it easier for issuers to avail themselves of this safe harbor than if we proposed a new alternative definition. The proposed non-exclusive safe harbor relies upon the conditions in existing Rule 701(c). While generally broad in application, the conditions in Rule 701(c) provide 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 proposing this safe harbor because we cannot measure the number of issuers that would rely on the safe harbor, we can qualitatively assess the proposed safe harbor's impact. A safe harbor that applies the familiar concepts of existing Rule 701(c) should create efficiencies in applying the safe harbor and avoid conflicts with existing rules, which should reduce costs more significantly for smaller issuers seeking to rely upon the proposed safe harbor.

Foreign private issuers would be able to rely on the proposed 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 would be impacted, we acknowledge that it may allow some foreign private issuers to delay registering with and reporting to the Commission. The considerations about cost and benefit tradeoffs for foreign private issuers would be analogous to the ones discussed above for domestic issuers.

Use of the term "accredited investor" in Exchange Act Section 12(g)

Section 501 of the JOBS Act raises the threshold number of holders of record at which an issuer is required to register a class of equity securities under the Exchange Act to 2,000 persons or 500 persons who are not accredited investors. The provision was effective upon enactment of the JOBS Act. In order for an issuer to rely on the new, higher threshold established by the JOBS Act, the issuer will need to be able to make accredited investor determinations if it has more than 500 holders of record.

We propose that the definition of "accredited investor" as specified in Securities Act Rule 501(a) determined as of the last day of the fiscal year rather than at the time of sale of the securities apply when making determinations under Exchange Act Section 12(g)(1). Issuers are familiar with this definition, which should facilitate compliance. Developing an alternative definition for purposes of Section 12(g)(1) could impose costs on issuers by requiring them to familiarize themselves with, and apply, a new and different standard. We are unable to estimate how many issuers would be impacted by using the Rule 501(a) definition of "accredited investor" as compared to an alternative definition. We acknowledge that not providing specific guidance or rules on how to confirm a security holder's status as an accredited investor for purposes of determining holders of record could result in some uncertainty for issuers.

Some commenters have recommended that the Commission address potential compliance issues related to the accredited investor threshold by providing a safe harbor for determining accredited investor status.[100] We could, among other things, permit an issuer to rely on an annual affirmation of accredited investor status by the investor or rely on an ongoing basis on information regarding accredited investor status received 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, or permit issuers to otherwise rely on information previously provided by an investor.

Addressing potential compliance issues relating to the use of "accredited investor" in Section 12(g) could increase efficiency by 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 would likely be less costly than requiring an issuer to establish a reasonable basis for its determination through other means. These methods, however, may be less accurate in establishing whether the investor is accredited.

Alternatively, a safe harbor that permits an issuer to rely on an ongoing basis on information previously obtained relating to accredited investors status, such as allowing reliance on information obtained 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 even less costly than requiring the issuer to seek an annual affirmation of accredited investor status by the investor or to establish a reasonable belief

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[100] See, e.g., letters from ABA, Foley & Lardner and NYCBA.

that the investor is an accredited investor, but could also lead to more outdated information. Permitting issuers to rely on inaccurate information to determine accredited investor status could result in issuers with more than 500 non-accredited investors failing to register and leaving investors in those issuers with less information and protection under the federal securities laws. These costs may be mitigated if the safe harbor specified time limits on the permitted use of the information or if the safe harbor were conditioned upon the issuer not having information that the previously obtained information was incorrect, unreliable or had changed.

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. 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 the 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.

Request for Comment

18. In this release we have discussed the anticipated costs and benefits of the proposed rules. We request data to quantify the costs and the value of the benefits described throughout this release. We seek estimates of these costs and benefits, as well as any costs and benefits not described, that may result from the adoption of these proposed amendments. We also request comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked.

VI. 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").[101] The hours and costs associated with preparing and filing forms 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 proposed today do not alter the disclosure requirements set forth in the rules and forms; however, the JOBS Act amendments to Exchange Act Sections 12(g) and 15(d) and the proposed amendments to our rules to reflect those statutory amendments are expected to immaterially 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 proposed amendments would provide thresholds that issuers may rely on when determining their registration and reporting obligations and would allow savings and loan holding companies to use the same registration and termination of registration or suspension of

[101] 44 U.S.C. 3501 et seq.

reporting thresholds that apply to banks and bank holding companies.[102] Exchange Act Section 12(g)(5) and the proposed 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 would reduce the number of registrants required to continue filing with the Commission and also reduce the number of issuers required to initially register a class of securities.[103] For purposes of the PRA, we estimate that the amendments would not materially reduce the number of filings received, nor would the changes 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); [104]

(2) "Form 20-F" (OMB Control No. 3235-0288);[105]

(3) "Form 40-F" (OMB Control No. 3235-0381);[106]

(4) "Form 10-K" (OMB Control No. 3235-0063); [107]

(5) "Form 10-Q" (OMB Control No. 3235-0070); [108]

(6) "Form 8-K" (OMB Control No. 3235-0060); [109]

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102 We are proposing to amend Rule 12g-1 to reflect the new higher thresholds in Section 12(g)(1) and to establish an increased registration threshold for savings and loan holding companies.

103 The changes to Rule 12g5-1 are expected to affect the number of issuers required to register with the Commission; however, we do not have access to data to support an estimate of the number of issuers that will not be required to file reports based on the JOBS Act amendments and our proposed implementation of such amendments. Due to the lack of data, for PRA purposes we are not intending to provide a reduced estimate of the number of issuers.

104 17 CFR 249.10.

105 17 CFR 249.220f.

106 17 CFR 249.240f.

107 17 CFR 249.310.

108 17 CFR 249.308a.

109 17 CFR 249.308.

(7) "Schedule 14A" (OMB Control No. 3235-0059); [110]

(8) "Schedule 14C" (OMB Control No. 3235-0057); [111]

(9) "Form 15" (OMB Control No. 3235-0167).

The forms were adopted under the Exchange 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 625 Exchange Act registrants that are bank holding companies or savings and loan holding companies. We estimate that approximately 90 bank holding companies have filed Forms 15 to terminate or suspend their reporting obligations under the Exchange Act based on the statutory changes in the JOBS Act.[112] We further estimate that approximately 90 savings and loan holding companies or similar entities with fewer than 1,200 holders of record would be eligible to file a Form 15 after our proposed changes. 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. Because the proposed rule amendments do not affect our estimates of the burden or cost per filing and we do not anticipate a material decrease in the number of filings as a result of the proposed rule amendments, we are not submitting revised burden estimates for these collections of information to OMB for review in accordance with the PRA and its implementing regulations at this time.[113]

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110 17 CFR 240.14a-101.

111 17 CFR 240.14c-101.

112 After the JOBS Act became effective, we saw 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.

113 44 U.S.C. 3507(d); 5 CFR 1320.11.

We request comment on our approach and the accuracy of the current estimates. Pursuant to 44 U.S.C. 3506(c)(2)(A), the Commission solicits comments to: (1) evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of burden of the collection of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are required to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-12-14. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-12-14, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

VII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[114] the Commission must advise OMB as to whether a proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review.

We request comment on whether our proposed amendments would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment or innovation.

We request those submitting comments to provide empirical data and other factual support for their views to the extent possible.

VIII. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

The Commission has prepared this Initial Regulatory Flexibility Act Analysis in accordance with 5 U.S.C. 603. This Initial Regulatory Flexibility Act Analysis relates to

[114] Pub. L. No. 104-121, Tit. II, 110 Stat. 857 (1996).

the proposed 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.

A. Reasons for, and Objectives of, the Proposed Action

The primary reason for, and objective of, the proposed amendments is to implement Title V and Title VI of the JOBS Act. The JOBS Act directs the Commission to issue rules to implement the 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. We are proposing rules that would revise existing rules to reflect the new, higher Exchange Act registration, termination of registration and suspension of reporting thresholds for banks 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." We are also proposing to provide relief from the Exchange Act registration requirements for savings and loan holding companies by applying the same thresholds to savings and loan holding companies that apply to banks and bank holding companies. Permitting savings and loan holding companies to register, terminate registration and suspend reporting using the same thresholds as banks and bank holding companies would provide consistent treatment across depository institutions. Revising the definition and providing a non-exclusive safe harbor to issuers relating to the determination of securities "held of record" would further assist issuers in determining which holders of record they are required to count under the registration requirements of Exchange Act Section 12(g).

B. Small Entities Subject to the Proposed Rules

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.[115] Exchange Act Rule 0-10(a)[116] 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. We estimate that there are approximately 900 issuers that are required to file with the Commission, other than investment companies, that may be considered small entities.

The proposed rules establishing the use of the Securities Act Rule 501(a) definition of "accredited investor" under Exchange Act Section 12(g)(1) and amending the definition of "held of record" to exclude certain securities held by persons who received them pursuant to employee compensation plans and establishing a non-exclusive safe harbor for issuers to follow when determining whether those securities are "held of record" 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 proposed rules may facilitate private offerings and the ability of an issuer to determine their registration and reporting obligations. By excluding

115 17 CFR 270.0-10(a).

116 17 CFR 240.0-10(a).

certain employee compensation securities from the definition of "held of record," the proposed rules would 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 estimate the number of small entities affected by these proposed rules. By definition, they 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. We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

C. Projected Reporting, Recordkeeping and Other Compliance Requirements

When determining whether an issuer must register under Section 12(g)(1), the issuer would be permitted to rely on the proposed rules. The proposed use of the Securities Act Rule 501(a) definition of "accredited investor" and safe harbor under the proposed amendment to the definition of "held of record" would assist an issuer in determining the number of holders of record. In order for an issuer to rely on the safe harbor, the securities would need to be issued in a transaction exempt from, or not subject to, the registration requirements and satisfy the requirements of 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 safe harbor conditions. We are not aware of any other

recordkeeping or compliance requirements associated with the proposed definition and safe harbor.

The proposed rules and amendments affecting banks, bank holding companies and savings and loan holding companies would not add any new reporting, recordkeeping or other compliance requirements on those entities and we are not aware of any bank, bank holding company, or savings and loan holding company registrants with less than $5 million in assets. The proposed rules would raise the thresholds relating to registration for those entities and reduce their compliance burdens.

D. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the proposed rules or amendments.

E. Significant Alternatives

Pursuant to Section 3(a) of the Regulatory Flexibility Act,[117] the Commission must consider certain types of alternatives, including: (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 rule, or any part of the rule, for small entities.

We are proposing that the current definition of "accredited investor" in Securities Act Rule 501(a) apply in making determinations under Exchange Act Rule 12g-1(b)(1). We could develop a new definition of "accredited investor" for purposes of Section

[117] 5 U.S.C. 603(c).

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 Rule 501(a) definition of "accredited investor" will further this regulatory objective for all issuers, including small entities.

The proposed amendment to the definition of "held of record" and related safe harbor, if adopted, would apply to all issuers, including small entities, that choose to exclude securities held by persons who received them pursuant to employee compensation plans in certain exempt transactions or transactions not involving a sale within the meaning of Securities Act Section 2(a)(3). The proposed 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.

The proposed rules are intended to permit issuers, including small entities, to exclude certain securities from the 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.[118] 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 the threshold. 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.

F. Solicitation of Comment

We are soliciting comments regarding this analysis. We request comment on the number of small entities that would be subject to the rules and whether the proposed rules would have any effects that have not been discussed. We request that commenters describe the nature of any effects on small entities subject to the rules and provide empirical data to support the nature and extent of the effects.

IX. STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AMENDMENTS

The amendments contained in this release are being proposed 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 proposes to amend Title 17, chapter II of the Code of Federal Regulations, as follows:

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[118] Under Section 12(g) an issuer is not required to register unless the issuer has total assets exceeding $10 million at the end of its fiscal year.

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), 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

2. Amend § 230.405 by adding an Instruction to paragraph (1) to the definition of "Foreign private issuer" to read as follows:

§ 230.405 Definitions of terms

* * * * *

Foreign private issuer. (1) * * *

INSTRUCTION TO PARAGRAPH (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) 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)(7)(i)(A) 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), and 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 revising the Instruction to Paragraph (c)(1) to read as follows:

§ 240.3b-4 Definition of "foreign government," "foreign issuer" and "foreign private issuer".

* * * * *

(c) * * *

INSTRUCTION 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)(7)(i)(A) 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 and the section heading and remove the authority citation following § 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 security pursuant to section 12(g)(1) of the Act (15 U.S.C. 78*l*(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 security 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 on such day rather than at the time of the sale of the securities); or

(2) 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); the class of equity security was held of record by fewer than 2,000 persons.

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 which would have been required to be registered pursuant to section 12(g)(1) of the Act (15 U.S.C. 78*l*(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. 78*l*(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. 78*l*(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) 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. 78*l*) or rules thereunder and all securities of such class are held of record by 300 or more 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 or more persons.

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 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.

* * *

(b) * * *

(2) All securities of such class are held of record by 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.

* * *

(c) * * *

(2) All securities of such class are held of record by 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.

* * * * *

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. 78*l*(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;

(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; or

(3) 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); fewer than 1,200 persons.

* * * * *

9. Amend § 240.12g5-1 by adding paragraph (a)(7) to read as follows:

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

* * * * *

(a) * * *

(7)(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. 78*l*(g)(1)), an issuer may exclude securities:

(A) Held by persons who received the securities pursuant to an employee compensation plan in transactions;

(*1*) Exempt from the registration requirements of section 5 of the Securities Act of 1933 (15 U.S.C. 77e); or

(*2*) That did not involve a sale within the meaning of section 2(a)(3) of the Securities Act of 1933 (15 U.S.C. 77b(a)(3)); and

(B) Held by persons eligible to receive securities from the issuer pursuant to § 230.701(c) of this chapter who received the securities in a transaction exempt from the

registration requirements of section 5 of the Securities Act (15 U.S.C. 77e) in exchange for securities excludable under this paragraph (a)(7).

(ii) As a non-exclusive safe harbor under this paragraph (a)(7), a person will be deemed to have received the securities pursuant to an employee compensation plan if such person received the securities pursuant to a compensatory benefit plan in transactions that meet the conditions of § 230.701(c) of this chapter.

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;

(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; or

(iii) 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); fewer than 1,200 persons; and

* * * * *

By the Commission.

Brent J. Fields
Secretary

December 17, 2014